

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. CRIMINAL NO. 04-2 ERIE

DANIEL RAY HINES

EVIDENTIARY HEARING ON DEFENDANT'S 2255 MOTION

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Courtroom C, U.S. Courthouse, Erie,
Pennsylvania, on Tuesday, October 17, 2006.

APPEARANCES:

MARSHALL J. PICCININI, Assistant United States
Attorney, appearing on behalf of the Government.

JOHN J. MEAD, Esquire, appearing on behalf of

Ronald J. Bench, RMR - Official Court Reporter

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1 I N D E X

2

3 WITNESSES: DIRECT CROSS REDIRECT RECROSS

4 FOR THE PETITIONER:

5 Daniel Ray Hines 4 8 18 --

6 Mary Ann Hines 45 46 51 --

7

8 FOR THE GOVERNMENT:

9 Thomas W. Patton 22 37 42,44 --

10 Thomas W. Patton 57 69 72 --

11

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13

14 EXHIBITS:

IDENTIFIED

ADMITTED

15	Government Exhibit 1	27	57
16	Government Exhibit 2	57	60
17	Government Exhibit 3	62	65
18	Government Exhibit 4	62	65
19	Government Exhibit 5	64	65

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1 P R O C E E D I N G S

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3 (Whereupon, the proceedings began at 9:00 a.m., on

4 Tuesday, October 17, 2006, in Courtroom C.)

5

6 THE COURT: This is the time set for a hearing on

7 the petitioner's motion to vacate sentence pursuant to 28

8 U.S.C. 2255. The hearing is being held consistent with the

9 dictates of Solis_v._United_States, 252 F.3d 289 (3rd Cir.

10 2001). Are we ready to go?

11 MR. MEAD: Yes, your Honor. Would I be proceeding,
12 your Honor?

13 THE COURT: Yes.

14 MR. MEAD: I think Mr. Patton is going to be here in
15 a few minutes, he's already here, he just ran to the restroom.

16 Either Mr. Piccinini or I will be calling him as a witness as
17 well. There will only be Mr. Hines and Mr. Patton.

18 THE COURT: Why don't you do this, Mr. Mead, while
19 we're waiting for him to come, if he's going to be your first
20 witness, let me just ask you a couple questions in terms of
21 focusing our inquiry. Is it accurate for me to say that the
22 sole factual inquiry in this hearing today is whether or not as
23 a matter of fact your client requested that an appeal be taken
24 from his resentence of August 2, 2005?

25 MR. MEAD: That's the only issue, your Honor. Your

1 Honor, we can call Mr. Hines, I don't need Mr. Patton first.

2 MR. PICCININI: Your Honor, as a preliminary matter,
3 in my discussions with Attorney Patton, when he comes back into
4 the courtroom -- he has not been willing to talk with
5 government counsel in our efforts to defend the Public
6 Defender's Office, indicating principally that he, without an
7 order from the court, his office did not believe that they
8 could sufficiently testify concerning the attorney-client
9 relationship. Based upon the clear state of the law, in light
10 of the defendant's allegations concerning Mr. Patton's
11 ineffectiveness --

12 THE COURT: It's a clear waiver of his
13 attorney-client privilege.

14 MR. PICCININI: I believe that if Attorney Patton's
15 office is ordered by the court, indicating just verbally that
16 you find that the attorney-client privilege has been waived in
17 regards to the matters Mr. Hines raised and allow Mr. Patton to
18 testify in this regard.

19 THE COURT: All right, very good. Who are you going
20 to call first, Mr. Mead?

21 MR. MEAD: I'll call Mr. Hines first, your Honor.

22 THE COURT: All right.

23 DEPUTY CLERK: Please raise your right hand.

24 DANIEL RAY HINES, PETITIONER HEREIN, SWORN

25 DIRECT EXAMINATION

5

1 BY MR. MEAD:

2 Q. Sir, can you state your name, please?

3 A. Daniel Hines.

4 Q. Mr. Hines, I want to direct your attention back to August

5 of 2004. Did you enter a guilty plea in this courtroom?

6 A. Yes, I did.

7 Q. What did you plead guilty to that day, sir?

8 A. Conspiracy to manufacture.

9 Q. And in November of 2004, were you sentenced for that

10 crime?

11 A. Yes, I was.

12 Q. Do you recall what your sentence was?

13 A. 140 months.

14 Q. Do you recall if that was appealed?

15 A. Yes, it was.

16 Q. Do you know the result of that appeal?

17 A. Yes, 135 months.

18 THE COURT: Sir, keep your voice up, please.

19 BY MR. MEAD:

20 Q. 135 months you said?

21 A. Yes.

22 Q. During the guilty plea and the first sentencing and your

23 appeal, who was your attorney?

24 A. Tom Patton.

25 Q. And, to your knowledge, is he an Assistant Federal Public

6

1 Defender?

2 A. Yes.

3 Q. Do you recall in August of 2005 if you were resentenced?

4 A. Yes, I was.

5 Q. And do you recall what your resentencing was?

6 A. 135 months.

7 Q. Following that resentencing, did you have any discussion

8 with Mr. Patton, your attorney, about whether or not you wanted

9 to appeal?

10 A. Yes, I did.

11 Q. Can you tell us about that discussion?

12 A. After everything was done, I told him I'd like to try
13 again. He told me that he didn't really think it would do any
14 good, that was all that was said. Then the Marshals took me
15 away.

16 THE COURT: Mr. Hines, would you start that all over
17 again, please. Pull up and speak into the microphone. Tell me
18 again slowly exactly what the substance of the conversation was
19 you had with Mr. Patton and where did it occur?

20 THE WITNESS: When the hearing was over, I told him
21 I'd like to try it again, to have another appeal. And he told
22 me he didn't think it would really do any good. And then the
23 Marshals took me in there, there was nothing more said about
24 it. I assumed he was going to file another appeal.

25 BY MR. MEAD:

1 Q. Did you talk to Mr. Patton after the day of your second
2 sentencing?

3 A. I never did. But like six months went by, I never heard
4 nothing, I had my mom call and talk to him. He said he never

5 filed another appeal and it was too late.

6 Q. What is your mom's name?

7 A. Mary Hines.

8 Q. Did you correspond with Mr. Patton during that time?

9 A. No, I never did personally.

10 Q. All right. Was there any reason you did not correspond

11 with him during that time period?

12 A. I assumed he filed the appeal and it was just taking a

13 while to hear anything about it.

14 Q. When did you find out the appeal had not been filed?

15 A. When my mom called and talked to him.

16 Q. Now, at the time of your sentencing, do you recall Judge

17 McLaughlin saying you had 10 days to file an appeal?

18 A. Yeah, I remember him saying that. But I assumed that the

19 lawyer already knew that, you know.

20 Q. And at that time Mr. Patton was appointed to represent

21 you?

22 A. Yes.

23 Q. You weren't paying an attorney at that point?

24 A. No.

25 Q. Was there any reason you wouldn't have appealed at this

1 time?

2 A. No.

3 Q. Now, you filed your motion, your Habeas Corpus motion in

4 August, is that correct, of this year?

5 A. July, I think it was.

6 Q. July, all right. Was there any reason you waited until

7 July?

8 A. I didn't know that I could even do that until people

9 where I was told me that I could. When I found out he didn't

10 file an appeal, I thought that was the end of it. And I found

11 I could file a 2255.

12 MR. MEAD: That's all I have, your Honor.

13 THE COURT: Mr. Piccinini.

14 CROSS-EXAMINATION

15 BY MR. PICCININI:

16 Q. Mr. Hines, would you agree with me that it was August 2nd

17 of 2005, that you were resentenced?

18 A. Yes.

19 Q. And you would also agree with me that Judge McLaughlin

20 made it very clear to you, just as he did in your first

21 sentencing, that you had 10 days in which to file your appeal,

22 is that correct?

23 A. Yeah, I knew that. But I figured Mr. Patton knew that,

24 that he would do it anyhow.

25 Q. When you first appealed, after your original sentencing

9

1 in 2004, do you recall that within 10 days of your sentencing

2 having seen documentation showing that an appeal had been

3 filed?

4 A. I think it was longer than 10 days before I got any

5 paperwork. But I did get paperwork, yes.

6 Q. But it wasn't almost 12 months, was it?

7 A. No.

8 Q. It was sometime after sentencing, in fact, before you

9 were sent off to a federal correctional institution, before you

10 were designated, Mr. Patton went ahead and filed an appeal

11 within 10 days or whatever the time period was, and you knew

12 about it long before you were designated to a federal prison

13 and left Erie, isn't that true?

14 A. No, I never got any paperwork until I got to Schuylkill.

15 Q. Schuylkill?

16 A. Yeah, that's where I went.

17 Q. To the state correctional facility there or a federal

18 facility?

19 A. Federal.

20 Q. And how did you receive that paperwork from Mr. Patton?

21 A. It came in the mail.

22 Q. Did you write back to Mr. Patton or correspond with him

23 in any way?

24 A. No.

25 Q. Did you ever talk with Mr. Patton after that original

10

1 sentencing?

2 A. Never, until I came back for my resentencing.

3 Q. Okay. When you received the paperwork, you could tell

4 from the paperwork what the issue was that Mr. Patton was

5 appealing, is that correct?

6 A. Yes.

7 Q. And you would agree with me that he raised the same

8 issues that you guys raised in your appeal, those related to

9 whether or not the judge needed to follow the Sentencing
10 Guidelines, and whether you should have gotten extra time for
11 the guns being there; do you remember that?

12 A. Yeah.

13 Q. And it was clear to you in the paperwork from Mr. Patton
14 that he was appealing those issues that you raised at the
15 sentencing, is that correct?

16 A. Yes, it is.

17 Q. On your behalf Mr. Patton won that appeal, didn't he?

18 A. Yes.

19 Q. The case was sent back for resentencing so that Judge
20 McLaughlin could resentence you under what was known as
21 United_States_v._Booker?

22 A. Yes.

23 Q. And you were satisfied with Mr. Patton's representation
24 of you at that time?

25 A. Yeah, I think Mr. Patton is a nice guy, I have nothing

1 against him. I don't know what happened. I told him I wanted

2 to file again and for some reason it didn't happen, I don't

3 know why.

4 Q. What did you want to file, what were you seeking?

5 A. I'd like to get the gun enhancement taken off if it's at

6 all possible.

7 Q. Well, hadn't that argument been addressed by Judge

8 McLaughlin having taken testimony for more than an hour here

9 during your sentencing?

10 A. Yes.

11 Q. And did you realize that when Mr. Patton got you back and

12 got you resentenced down to 135 months, didn't he explain to

13 you that the 135 months was part of the same Sentencing

14 Guidelines that would have applied even if the gun enhancement

15 didn't occur?

16 A. Yes.

17 Q. So you and Mr. Patton discussed the fact that a 135

18 months could have been the sentence you received whether there

19 was a gun enhancement or not?

20 A. I knew that.

21 Q. How did you know that?

22 A. He told me that.

23 Q. And when did Mr. Patton tell you that?

24 A. Before I came into the court that day.

25 Q. Okay. So before coming into the court that day, you knew

12

1 that if the judge gave you 135 months, that sentence would have

2 been with or without the weapons enhancement, the gun

3 enhancement?

4 A. Yeah, but with this gun enhancement, I can't go through

5 the drug program, I'd really like to be able to do that.

6 Q. Okay. But as far as the length of the sentence that you

7 got, you knew that it didn't matter the length Judge McLaughlin

8 gave you, whether the gun enhancement applied or not?

9 A. Yes.

10 Q. So Attorney Patton discussed that with you?

11 A. Yes.

12 Q. And isn't it true that you didn't realize about this drug

13 program and the problems you had with it from the gun

14 enhancement, until after you got back to the federal

15 correctional facility?

16 A. No, I already knew before then that I couldn't take it

17 because of the gun enhancement.

18 Q. Okay. At what point in time did you discuss with
19 Attorney Patton that you wanted to appeal because you wanted to
20 get the drug program?

21 A. As soon as the court hearing was over, I told him.

22 THE COURT: Which one?

23 THE WITNESS: When I got resentenced, I told him I'd
24 like to try again. Because I'd like to get the enhancement
25 taken off if possible so I could go through the drug program.

13

1 I didn't explain all that to him, but I told him I wanted to
2 try again.

3 BY MR. PICCININI:

4 Q. Okay. When did this drug program problem come up,
5 because it was never raised in your first appeal, so you and
6 Mr. Patton hadn't seen that as an issue in your first appeal?

7 A. I believe he mentioned it during the hearing.

8 Q. Okay. So at the end of sentencing hearing when Mr.
9 Patton talked about the drug program, that's something you and
10 he had discussed back at that time?

11 A. I told Mr. Patton that was one of the things I wanted to

12 be able to do, was go to the drug program.

13 THE COURT: I need to know timeframes on this, I
14 need to know which hearing, when is this conversation
15 happening?

16 THE WITNESS: For my resentencing.

17 BY MR. PICCININI:

18 Q. Before the resentencing or after the resentencing?

19 A. I told him before that I couldn't go to the drug program
20 because of the enhancement.

21 Q. You told him that?

22 A. Yeah.

23 Q. Or he told you that?

24 A. I told him that because my case manager where I'm at told
25 me I wasn't qualified because of the gun enhancement.

14

1 Q. Okay. So you had to tell Attorney Patton that?

2 A. Yes.

3 MR. PICCININI: Your Honor, if you could just give
4 me one second to get some records.

5 THE COURT: All right.

6 BY MR. PICCININI:

7 Q. Now, concerning what you hope to gain on appeal, do you

8 agree with me that it wasn't your hope to have the sentence --

9 you didn't think you were going to be successful in having your

10 sentence reduced anymore, did you?

11 MR. MEAD: The first appeal or the second appeal?

12 BY MR. PICCININI:

13 Q. In your second appeal, you weren't seeking to have your

14 sentence reduced, you were just seeking, according to you

15 today, to have the gun enhancement removed?

16 A. You're talking about why I filed the 2255?

17 Q. I'm talking about what you hoped to gain when you told

18 Attorney Patton to appeal?

19 A. Well, if I could have got time off, that would be good.

20 But I'd like to get the gun enhancement off so I can go to the

21 drug program. I think the drug program would do more good for

22 me than all this time in jail would.

23 Q. At any point in time, do you recall when Judge McLaughlin

24 asked you to speak on your own behalf at your resentencing, why

25 didn't you say something to Judge McLaughlin about your concern

1 about the drug program?

2 A. I don't even know.

3 Q. Well, if it was the main issue that you wanted to appeal,

4 just moments after Judge McLaughlin told you you could appeal,

5 why didn't you mention it before, why didn't you even mention

6 it to Judge McLaughlin?

7 A. I don't know, I was nervous.

8 THE COURT: Keep your voice up, please.

9 THE WITNESS: I was nervous, I didn't know what to

10 say to him.

11 BY MR. PICCININI:

12 Q. Well, on page 14 of the transcript from the resentencing

13 on August 2, 2005, this is your opportunity to explain to the

14 court what your concerns are and what it is you want with

15 regard to your resentencing. And you say, "yes, your Honor,

16 when I was doing drugs, I never realized how bad it was for me

17 or anybody else around me. Now I see that what it has done to

18 me and my family. My kids don't even have no dad no more. I

19 can't even explain how bad I feel about it. But I'm just sorry

20 for what I've done. Pretty near everyday I'd like to go back

21 to working and have a regular life again." Judge McLaughlin
22 asks you how many kids you have. At no point in time did you
23 ever mention anything about your new revelation that the gun
24 enhancement affected the drug program, you never mentioned that
25 at all to Judge McLaughlin what you're saying today about

16

1 wanting to get the drug program. Why is it that, it's the
2 critical reason that you want to ask, that you supposedly ask
3 Mr. Patton to appeal, and that you had a discussion with Mr.
4 Patton just after you left this particular sentencing, why did
5 you never mention it to Judge McLaughlin?
6 A. Tom Patton brought it up when he was talking to him.
7 Q. But you're saying that this is the reason why you wanted
8 to appeal, that's what you told Attorney Patton, excuse me --
9 you're saying that you mentioned it to Attorney Patton, but you
10 never mentioned it to the judge. I'm just trying to figure out
11 if that's the reason why you filed your appeal, why that is?
12 A. I assumed it -- I understood they were probably going to
13 take the enhancement off and that's why I would get some time
14 off. I honestly didn't know that much about the law to know

15 what was going on.

16 Q. Now, with regard to Attorney Patton's discussion with
17 you, where did this discussion take place after your
18 resentencing?

19 A. After I was resentenced?

20 Q. Yes.

21 A. Sitting right over there.

22 Q. Sitting right over here in the courtroom, that's when you
23 told him that you wanted to appeal again?

24 A. Yes.

25 Q. What was the nature of your conversation?

17

1 A. That was all I got to say, I just told him I'd like to
2 try again. And then the Marshals were already getting me out
3 of here.

4 Q. Did Attorney Patton explain to you that there was no
5 reasonable likelihood of you winning on appeal?

6 A. The only thing he said was he didn't think it would do
7 any good.

8 Q. Did you agree with him after he explained it to you

9 supposedly?

10 A. No, the Marshals were taking me away. He said he didn't
11 think it would do no good, but he didn't say he wasn't going to
12 do it. I assumed he was still going to file it.

13 Q. Okay. And then how long did you stay in the Erie County
14 Prison before you went back to a federal facility?

15 A. They took me back to Crawford County that same day.

16 Q. How long did you stay in Crawford County?

17 A. I think two weeks.

18 Q. And then where did you go from there?

19 A. Back to Schuylkill.

20 Q. When you got to Schuylkill, did you have any
21 correspondence with Attorney Patton?

22 A. No, I didn't.

23 Q. Did he write to you or did you write to him?

24 A. No.

25 Q. Any phone conversations?

1 A. Not until I had my mom call.

2 Q. Well, the last time that you appealed, the first time

3 that you appealed, you indicated that you received the
4 paperwork shortly after getting to Schuylkill. Didn't you
5 become concerned all the way up until July of the next year,
6 that you hadn't seen any appeal that you supposedly asked for?

7 A. It took almost two months to get papers the first time.

8 Q. I'm talking almost a year later, you still hadn't filed
9 this 2255 action claiming that you had asked for an appeal.

10 What was your thought process during almost 11 months since the
11 time of your sentencing?

12 A. It was like five or six months, then I had my mom call
13 him.

14 Q. Did she call or did she write a letter?

15 A. She called him and talked to him.

16 Q. Was there a letter that was written back to your mother
17 in any way?

18 A. No.

19 Q. Just a phone conversation?

20 A. Yes.

21 MR. PICCININI: Your Honor, those are all the
22 questions I have.

23 THE COURT: Do you have anything else, Mr. Mead?

24 MR. MEAD: Yes, your Honor.

25 REDIRECT EXAMINATION

19

1 BY MR. MEAD:

2 Q. Mr. Hines, do you recall Mr. Patton speaking on your
3 behalf to the judge and indicating that you would not get
4 credit for your federal drug treatment if there was a gun
5 involved, correct?

6 A. Yes.

7 Q. He addressed that directly with Judge McLaughlin?

8 A. Yes.

9 Q. Do you feel like you had to address it again?

10 A. No, I didn't.

11 MR. PICCININI: Counsel, what hearing is that?

12 MR. MEAD: Page 15 of the transcript.

13 THE COURT: Which hearing?

14 MR. MEAD: I'm sorry, the second one, your Honor.

15 BY MR. MEAD:

16 Q. If I could read it into the record. It's the transcript
17 of August 2, 2005, "Mr. Patton: Your Honor, one other thing.
18 Even if Mr. Hines is admitted into the federal drug treatment

19 program because of the finding that there were firearms
20 involved in this offense, he will not receive a reduction.
21 The Court: He won't get any credit? Mr. Patton: Correct,
22 they may let him into the program, but he will not receive any
23 reduction in his sentence because this will be classified as a
24 violent offense. So, therefore, he's ineligible receiving a
25 reduction in sentence." Do you recall that occurring?

20

1 A. Yes.

2 Q. Did you feel you needed to bring it to the judge again?

3 A. No.

4 Q. Do you also recall Mr. Patton at the beginning of the
5 proceedings, at the resentencing, indicating that he continued
6 to object to the two-level enhancement for the firearm?

7 A. Yes.

8 Q. Did you feel any reason that you had to bring it up again
9 at that point?

10 A. No.

11 MR. MEAD: That's all I have, thank you.

12 THE COURT: Anything else, Mr. Piccinini?

13 MR. PICCININI: No, your Honor.

14 THE COURT: All right, you can step down. Mr.

15 Piccinini, do you want to consult, after I put on the record,

16 indicate the waiver of attorney-client privilege, do you want

17 to speak with Mr. Patton before you put him on the stand?

18 MR. PICCININI: If I may do so just briefly to see

19 if there's any documents in the file, so I don't fumble around

20 with that.

21 THE COURT: Mr. Patton, I understand that there's a

22 concern on your part and your office's part as to the breach of

23 any attorney-client privilege in this case, is that right?

24 MR. PATTON: Yes, sir. I didn't want to turn

25 anything over until you had made a ruling.

21

1 THE COURT: I find it's been waived and you can

2 testify with impunity on that issue.

3 MR. PATTON: The subpoena had requested documents

4 and I do have one that may be responsive to that. So based on

5 your ruling that the privilege has been waived, I will turn

6 that over to Mr. Piccinini.

7 THE COURT: All right. I'm going to take a short
8 recess, then you're going to have an opportunity to speak with
9 him.

10 (Recess from 9:25 a.m.; until 9:30 a.m.)

11 THE COURT: All right, Mr. Piccinini.

12 MR. PICCININI: Thank you, your Honor.

13 DEPUTY CLERK: Can you raise your right hand.

14 THOMAS W. PATTON, GOVERNMENT WITNESS, SWORN

15 THE COURT: All right, Mr. Piccinini.

16 MR. PICCININI: I didn't know that I had called
17 Mr. Patton, but I'll be happy to do the direct examination.

18 THE COURT: Just so I'm clear, I'm working under the
19 assumption that you were calling him on direct?

20 MR. PICCININI: Counsel had called him to testify,
21 but, nonetheless, had he not called him to testify, I would
22 have done so.

23 MR. MEAD: It doesn't matter to us, your Honor.

24 THE COURT: All right, if it doesn't matter to you,
25 then go ahead.

1 DIRECT EXAMINATION

2 BY MR. PICCININI:

3 Q. Attorney Patton, did you take on the representation of
4 Daniel Hines in your capacity as an Assistant Federal Public
5 Defender?

6 A. Yes.

7 Q. And during the course of your representation of Mr.
8 Hines, when it came to Mr. Hines entering a plea of guilty and
9 being sentenced here in federal court, do you recall, to a
10 general degree, the advocacy on your client's behalf at the
11 sentencing?

12 A. At the first sentencing?

13 Q. Yes.

14 A. Yes.

15 Q. And do you recall in this case that this was a sentencing
16 before Booker, after Apprendi, where issues related to the

17 judge's discretion at sentencing were still up in the air, but
18 zealously advocated on behalf of criminal defendants?

19 A. It was after Blakely was decided, but before Booker.

20 Q. So you were advocating Blakely issues concerning the

21 judge's ability to enhance the sentence and impose a sentence

22 under the guidelines?

23 A. That's correct.

24 Q. And, in addition, do you recall an issue that you raised

25 with regard to the two-level increase for weapons, the firearms

23

1 being present in Mr. Hines and Ms. Munnings' residence?

2 A. Yes.

3 Q. And there was lengthy testimony that day, I believe from

4 Special Agent Andy Petyak on that date?

5 A. Yes.

6 Q. After the resentencing, Judge McLaughlin found the

7 two-level enhancement and sentenced your client to 140 months,

8 what steps were taken or what discussions were had between you

9 and Mr. Hines concerning an appeal?

10 A. Well, based on the objections that we had filed prior to

11 the sentencing hearing, objecting to the manner, to the

12 application of the Sentencing Guidelines and objecting to the

13 gun, we filed an appeal to follow-up on both of those issues.

14 Q. And with regard to the decision to file an appeal, was

15 that a matter that you and Mr. Hines discussed after the
16 original sentencing?

17 A. I don't know if we talked about it afterwards or if in
18 the course of talking about the sentencing hearing, even before
19 the hearing, about what would happen based on whatever the
20 judge's rulings were at the sentencing hearing. So I don't
21 know if we talked about it before the sentencing hearing or
22 after the sentencing hearing or both.

23 Q. Well, in light of your advocacy in your history in the
24 Public Defender's Office in preparation for legal arguments,
25 either pretrial arguments or sentencing arguments, do you

24

1 discuss with your client what steps would be taken, depending
2 on a certain outcome that may occur in a particular hearing?

3 A. Well, often what happens is when you're having a
4 discussion with a client, I can't say that I remember having
5 this particular discussion with Mr. Hines, but very frequent
6 when you're talking about, whether it's a motion to suppress or
7 objections to a presentence report, we'll talk about what
8 objections we're filing, what motions we're filing, what our

9 arguments are going to be. And the clients will often ask what
10 happens if we lose, what happens if we win. We talk about the
11 likely outcomes and what action we'll take based upon whatever
12 decision the judge makes.

13 Q. In this particular case after the original sentencing, do
14 you recall meeting with Mr. Hines, either at the Erie County
15 Prison or here in the federal courthouse, to discuss the
16 original Blakely weapons enhancement appeal that was filed?

17 A. I don't remember talking to Dan about it. I don't have
18 any independent memory of that.

19 Q. Is there any documentation or any written correspondence
20 that you engage in with your clients when you make decisions
21 about filing appeals after sentencing?

22 A. No.

23 Q. And how would a defendant be notified if you do file an
24 appeal on their behalf?

25 A. He will be sent a copy of the notice of appeal. And

1 depending on if I'm going to actually do the appeal or if it's

2 an attorney in our Pittsburgh office, we have an appellate
3 division in our Pittsburgh office, if they're doing the appeal,
4 the notice of appeal will be mailed to the client, along with
5 all the briefs and any correspondence received from the Court
6 of Appeals.

7 Q. Are those notices of appeal filed within 10 days of the
8 sentencing, as Judge McLaughlin describes to your clients here
9 in courtroom?

10 A. Yes.

11 Q. How long does your office wait after the filing of the
12 notice of appeal before letting a client know that the appeal
13 has been filed?

14 A. Well, I can't speak for the Pittsburgh office because I'm
15 not involved in that. But our normal practice is once the
16 notice of appeal is filed, roughly at the same time a copy of
17 it gets sent out in the mail to the client.

18 Q. When you send that through the federal prison system, is
19 there any documentation, is that sent certified mail, is there
20 any notice in the file with regard to when these documents are
21 submitted to your clients?

22 A. No, we just keep copies of the letters that are sent.

23 Q. In your search of your files in this case, do you have

24 copies of the letters sent to Mr. Hines concerning the original
25 notice of appeal that's filed in the original case?

26

1 A. In the original?

2 Q. The original sentencing?

3 A. I don't think so, I believe the subpoena that we were
4 served, directed any correspondence that we had regarding any
5 conversations regarding the resentencing. So I didn't look at
6 anything with regard to the original appeal.

7 Q. Do you have your file?

8 A. I do not.

9 Q. Is it maintained here in Erie or down in Pittsburgh?

10 A. It was here in Erie, but it was turned over to Attorney
11 Mead.

12 Q. Pardon me.

13 A. It was turned over to Attorney Mead.

14 MR. MEAD: I don't have it with me, it's in my
15 office, but I didn't bring the entire file.

16 BY MR. PICCININI:

17 Q. Well, with regard to whether you -- if a notice was sent

18 to the defendant shortly after the appeal was taken, a letter
19 indicating that a notice of appeal had been filed, if such a
20 thing happened, would a copy of that letter to the defendant
21 appear in the file?

22 A. Yes, it should.

23 Q. Now, as the normal course, after you are done with a
24 particular case up here in Erie and you're making decisions
25 about whether to file an appeal or whether your office in

27

1 Pittsburgh will file an appeal, whether to close out your
2 cases, how do you correspond with the Pittsburgh office to let
3 them know what the status of a case is after sentencing is over
4 with?

5 A. Through e-mail.

6 Q. And what is the purpose of your corresponding with
7 Pittsburgh when you're sending --

8 A. Either myself or my secretary sends an e-mail to Karen
9 Gerlach, which is G-e-r-l-a-c-h, Karen is the head of our
10 appellate division in the Pittsburgh office. We also send it
11 to Linda Martz, M-a-r-t-z, Linda is Karen's secretary, to let

12 them know whether or not a notice of appeal needs to be filed
13 or not.

14 Q. Who in your office sends this e-mail to Karen Gerlach's
15 attention?

16 A. Sometimes I send it, sometimes my secretary sends it.

17 Q. And if your secretary sends an e-mail concerning the
18 status of a case after sentencing, does she receive the
19 information concerning the status from you?

20 A. As far as I know.

21 Q. Mr. Patton, I'm going to show you what I've marked as
22 Government Exhibit 1 for identification, can you identify this
23 document?

24 A. That is a printed version of an e-mail that was sent from
25 Elizabeth Durkin, who is my secretary, on August 9, 2005, to

1 Karen Gerlach and Linda Martz, with a copy to me.

2 Q. In the portions of this e-mail that have not been deleted
3 that relate to Daniel Hines, does this e-mail indicate that on
4 August 2, 2005, Daniel Hines was resentenced and that a
5 determination was made that no appeal would be filed?

6 A. Yes, the e-mail indicates, has a date of 8/2/05, which I
7 believe was the date of Dan's resentencing, says Daniel Hines
8 resentencing, and it says "no appeal."

9 Q. What does this particular document indicate to you with
10 regard to, at least what you told your staff, about an appeal
11 of Mr. Hines' case?

12 A. Well, I don't have any independent recollection of
13 speaking to Ms. Durkin about the e-mail. Based on our common
14 practice and looking at the e-mail, my assumption would be that
15 I told Ms. Durkin that there would not be any appeal of Mr.
16 Hines' resentencing. So that she could pass that information
17 on to the Pittsburgh office.

18 Q. Now, in this particular case with regards to the
19 resentencing, Mr. Hines testified here today that directly
20 after Judge McLaughlin sentenced him to a reduced sentence of
21 135 months, that he sat here in this courtroom and told you,
22 with regard to an appeal, told you that he'd like to try again.
23 Do you recall Mr. Hines telling you after the sentencing that
24 he'd like to try another appeal?

25 A. I don't recall talking with Dan about an appeal. I just

1 don't have any independent recollection. It would be
2 consistent with my normal practice, to sit at counsel table
3 after a sentencing or in this case a resentencing, and discuss
4 appellate rights with a client. I do that on a -- that's a
5 normal thing for me to do.

6 Q. Is it normal for you, counsel, that when a defendant
7 after sentencing tells you that I'd like to try again, appeal
8 again, that you disregard his request and not file an appeal,
9 is that your normal practice?

10 A. No, my normal practice would be, well, as far as I know,
11 my practice as always been that if a client asks for an appeal,
12 that I would file one. But I can't say that Dan did not say
13 those things to me because as I'm sitting here, I have no
14 independent memory of -- I know I talked with Dan after the
15 sentencing, because we always do. Just, if for nothing else,
16 just saying good luck with your sentence, hope things go well
17 for you. So I'd be pretty confident that we had at least some
18 discussion at counsel table after the sentencing. But I have
19 no independent memory at all what was discussed.

20 Q. From the standpoint of your recollection, prior to this

21 resentencing, as you did before the original sentencing, did
22 you discuss with Daniel Hines what might happen at the
23 resentencing and what the issues would be and the likelihood of
24 an appeal or the propriety of an appeal after the resentencing,
25 since you were already successful once in the Third Circuit?

30

1 A. Well, I believe when I testified earlier, I said I could
2 not recall whether or not I had talked with Dan before even the
3 original sentencing about what would happen based on the
4 outcome of the sentencing. I just testified that would be
5 something that would commonly happen with clients. I don't
6 have any -- I know I met with Dan before the resentencing,
7 after he got brought back to the Erie County Prison by the
8 Marshals for the resentencing, I'm confident that I met with
9 him over there to talk about the resentencing. But as far as
10 the details of that conversation and whether or not we talked
11 about appellate rights in that conversation, I have no memory.
12 Q. But it is contrary to your common practice that when
13 someone tells you that they'd like an appeal to be filed, for
14 you not to file an appeal?

15 A. Yes, if someone asks me to file an appeal, I have never,

16 at least not knowingly, ever failed to file an appeal.

17 Q. Now, Mr. Hines also testified that his mother called you

18 approximately six months after the original sentencing and

19 asked you or discussed with you why you hadn't filed the

20 appeal. Do you recall having that telephone conversation with

21 Mr. Hines' mother?

22 A. I recall having a number of phone conversations with

23 Dan's mom after -- well, throughout my entire representation of

24 Dan. But even after the resentencing, I recall having

25 conversations with her. I don't recall if we talked about an

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1 appeal or a lack of an appeal. I remember talking about some

2 subjects with her, I don't remember talking about that

3 particular subject.

4 Q. What subjects?

5 A. There was a motorcycle that had been seized during the

6 search of the residence where Dan and Ms. Munnings were living.

7 They were just having a very hard time getting that motorcycle

8 released back to them from the Pennsylvania State Police. So I

9 talked with Ms. Hines about that a number of times. Actually,

10 I talked with the Pennsylvania state trooper, at least once,

11 about that issue. So I recall talking with her about that. I

12 don't recall talking to her about an appeal, why one wasn't

13 done. That certainly is possible that we did that, I just

14 don't recall that.

15 Q. Counsel, if six months after a resentencing, if you, on

16 your own, found out from a client's mother that he was

17 indicating that you failed to file an appeal that he requested

18 be filed on his behalf. First of all, does that appear to be

19 something that would stick in your mind, would it concern you

20 that a mother was calling, asking you or challenging you why

21 you didn't file an appeal on behalf of her son when he asked

22 you to do so?

23 A. Not necessarily, because I have a lot of conversations

24 with family members about why or why not, or why particular

25 things were or were not done in a case. And in a lot of those

1 conversations there's been misunderstandings between, or

2 there's certainly been a difference between what I talked with

3 the client about and what the family member thinks happened.

4 Usually when I got a call like that, I will explain, to the

5 extent I can, why something was or was not done. Obviously,

6 without being able to get into any detailed discussions of

7 conversations I had with the client.

8 Q. Was Mrs. Hines like that, you're talking about people who

9 called and complained about actions that weren't taken, wasn't

10 she still seeing you as the attorney for her son and she was

11 looking for your help to get the motorcycle back?

12 A. She was looking for advice on how to get the motorcycle

13 back. I had explained to her I didn't represent Dan or herself

14 or her husband with regard to the motorcycle, I wasn't going to

15 represent them in some kind of legal action against the state

16 police to try and get the motorcycle back.

17 Q. But your relationship with the Hines family was such that

18 even knowing that you were someone who they would turn to to

19 ask those questions, they're not lawyers?

20 A. No, they're not.

21 Q. You had a decent enough relationship with them that six

22 months after the man is sentenced, she felt comfortable calling

23 you concerned about the motorcycle. Did you have a decent

24 relationship with Mrs. Hines?

25 A. Yes, I believe so.

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1 Q. Was she the type of client who was calling complaining to
2 you about things that had not been done?

3 A. No, she was always very nice on the telephone. Even when
4 she was asking, if she would ask a question, she was always
5 very pleasant.

6 Q. But the reason why I'm asking the question, counsel, when
7 I asked you whether she had had this conversation with you and
8 whether or not it would stick in your mind, you kind of
9 recalled back to other clients who would call and family
10 members who would call and complain about things that weren't
11 done. I'm asking you whether Mrs. Hines was that type of
12 family member to a client, who was regularly calling you
13 complaining about your representation of their son?

14 A. No, I didn't see her as calling and complaining about the
15 representation.

16 Q. Now, if you received information directly from a client's
17 family member about a serious claim that you failed to file an
18 appeal that was requested, and they're waiting for the appeal

19 you're supposed to file and you were concerned that you may
20 have not filed the appeal, wouldn't you report that to your own
21 office or to the court?

22 A. No, because if she called me six months after the
23 sentencing, no notice of appeal can be filed once you're
24 outside the 10 days, that's it. Most likely what I would do is
25 inform them that it's impossible to file a notice of appeal at

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1 this point. But I have routinely told my clients or family
2 members that if they are unhappy -- they think I didn't perform
3 adequately, they can file a 2255 motion. I'm not saying that I
4 said that to Mrs. Hines, as I said, I don't recall talking to
5 her about that issue. That would be what I would normally do
6 under that situation. Contacting the court, there isn't
7 anything that can be done at that point in time to try and get
8 an appeal filed.

9 Q. With regard to the particular facts of this case, having
10 litigated the issue in front of Judge McLaughlin, having taken
11 testimony on the weapons enhancement and having understood his
12 findings with regard to the weapons enhancement, did this seem

13 to be the type of situation, after a resentencing, after a
14 successful appeal, that you found there to be a rational basis
15 to file an appeal?

16 A. Well, based on Judge McLaughlin's factual findings with
17 regard to the gun, I certainly wouldn't characterize this as
18 being one that would likely be a winning argument on appeal.
19 The flip side is I don't think it would be a frivolous appeal
20 to challenge the gun enhancement. My understanding of it,
21 number one, Judge McLaughlin made a credibility finding with
22 regard to DEA Agent Petyak's testimony about where firearms
23 were found in the house. And then made a finding that the gun
24 was present. My understanding is that would be a review for
25 abuse of discretion on appeal, which would be a tough argument

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1 to win.

2 Q. Now, with regard to, it seems to me today that you don't
3 recall having any type of conversation or the content of it,
4 did Daniel Hines in any way reasonably represent to you, that
5 you can recall today, that he wanted to appeal again?

6 A. As I said, I don't have any recollection talking to Dan

7 about appeal rights. I'm not saying it did happen, I'm not
8 saying it didn't happen, I'm saying I don't have any memory of
9 it, when I'm sitting here over a year later.

10 Q. Fair enough. Now, concerning the impact that the weapons
11 enhancement had on Mr. Hines service of his sentence; how long
12 have you been a Federal Public Defender?

13 A. A little over 10 years.

14 Q. Both here in the Western District of Pennsylvania and
15 also in the Midwest?

16 A. Yes.

17 Q. In the course of your representation of clients, have you
18 made yourself aware of the various programs available through
19 the federal prison program and the ways in which or the things
20 that occurred at sentencing that may impact the programs that
21 your clients can engage in?

22 A. Yes, I've tried to.

23 Q. And oftentimes you find yourself advocating to the court
24 concerns you have with regard to either locations or the types
25 of programs that your clients can benefit from in the federal

1 prison system?

2 A. Yes.

3 Q. In this particular case, were you aware at the original

4 sentencing any impact that the weapons enhancement would have

5 on Mr. Hines's ability to receive drug treatment?

6 A. At the original sentencing -- I can't recall if I did or

7 I didn't. I mean, I know in general if you're convicted of a

8 violent offense or if you have any prior convictions for any

9 offense that the Bureau of Prisons considers violent, you're

10 not going to be able to get any reduction in your sentence if

11 you take the drug program that the Bureau of Prisons offers.

12 Q. You were clearly aware of that at the resentencing

13 because you actually discussed the matter with Judge McLaughlin

14 on the record?

15 A. Well, briefly before I was called to the stand, you had

16 indicated to me that that was discussed at the resentencing.

17 So if that's the case, obviously, that was something --

18 Q. Do you recall it being Mr. Hines that described for you

19 the impact that the weapons enhancement has on a federal

20 prisoner or is that something you knew or figured out on your

21 own?

22 A. I can't say for sure -- that I knew that the gun

23 enhancement would prevent him from getting the benefit of that
24 program.

25 THE COURT: Just so I'm clear, is it the gun

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1 enhancement that would prevent him from getting credit for
2 participating in the program or prevent him from participating
3 in that program at all, do you know?

4 THE WITNESS: My understanding and it could be
5 wrong, but my understanding is if you have either a conviction
6 or the gun enhancement, the Bureau of Prisons would let you in
7 the drug treatment program, but you wouldn't get any time cut,
8 that's my understanding, it's quite possible that that's wrong.
9 Most of my client's interest is whether or not they're going to
10 get the reduction in time. So I try to let them know about
11 whether or not they're qualified for that. But I can't say --
12 I knew for sure -- if Dan would have told me about that, I
13 can't say for sure I knew about that before he told me or not.

14 BY MR. PICCININI:

15 Q. Do you recall having any specific conversations with him

16 about that subject?

17 A. I can't tell you that I have a specific recollection of
18 talking to him about that.

19 MR. PICCININI: Your Honor, that's all the questions
20 I have at this time.

21 THE COURT: Mr. Mead.

22 CROSS-EXAMINATION

23 BY MR. MEAD:

24 Q. Mr. Patton, I'm correct that you're the only Assistant
25 Federal Public Defender in the Erie area?

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1 A. That's correct.

2 Q. Approximately, how many cases do you have a year?

3 A. Well, it's increased every year since I've been here. In
4 the last fiscal year that ended in September, we closed, I
5 think it was 125 cases for that fiscal year. But that included
6 kind of an artificial bump up because we had a number of Habeas
7 cases on one particular issue. So if you kind of took that out
8 of the mix, they were all really combined, but we got
9 individual stats for each one, probably close to 80.

10 Q. Eighty did you say?

11 A. Yes. But that's the highest we've ever been. Every year

12 it's gone up.

13 Q. Now, directing your attention back to the second

14 resentencing, am I correct that your testimony is that you

15 don't recall having any discussion with Dan about an appeal one

16 way or the another?

17 A. That's correct.

18 Q. So if he testified that he did say to you, hey, I want to

19 try it again, you would not dispute that, correct?

20 A. I just don't have any memory discussing the issue with

21 him one way or the other.

22 Q. Was he upset at the time of that sentencing, do you

23 recall?

24 A. I wouldn't -- I wouldn't say that he was upset, no, Dan

25 was always very -- he was a very easy client to work with. And

1 we knew going into the resentencing that there was a good

2 chance that he'd end up with a sentence that was close to the

3 original, if not the same sentence.

4 Q. And at the resentencing, am I correct that you at the
5 beginning of the resentencing, and I have the transcript, I
6 know this is a year ago, I'm happy to show you the transcript
7 to refresh your memory, do you recall continuing to object to
8 the two-level enhancement for the firearm?

9 A. It's my recollection of that at the resentencing I told
10 the judge that we were still objecting to that, but we didn't
11 have any different or new evidence to present on the issue. My
12 memory of it was that Judge McLaughlin indicated that his
13 ruling on that issue was going to be the same as the original
14 sentencing.

15 MR. MEAD: Again, it's not a memory test, that's
16 fairly accurate, your Honor.

17 THE COURT: That is accurate, I read the transcript
18 this morning.

19 BY MR. MEAD:

20 Q. Do you also recall, Mr. Patton, that you discussed the
21 fact that if Mr. Hines went into the federal drug treatment
22 program, because of this finding there were firearms involved
23 in the offense, he would not receive a reduction, do you recall
24 discussing that?

25 A. I actually don't, Mr. Piccinini had mentioned that to me

1 before the hearing.

2 MR. MEAD: May I show him the transcript, your
3 Honor?

4 THE COURT: Sure.

5 MR. MEAD: I know it's not a memory test, but I just
6 want to put that on the record that's what you did.

7 THE COURT: What's he looking at?

8 MR. MEAD: He's looking at page 15, your Honor, in
9 which he makes the argument to the court that if there is no
10 finding of the gun, then Mr. Hines is eligible for the program,
11 for a reduction.

12 THE COURT: For a reduction?

13 MR. MEAD: Correct.

14 THE WITNESS: Yes, I see that, where I argue to the
15 judge that if Dan got the gun bump, that while he may be able
16 to participate in the drug program, he would not get a
17 reduction in sentence.

18 BY MR. MEAD:

19 Q. And I believe your testimony was you don't recall if you

20 raised that argument because you knew about it or because Mr.

21 Hines brought it to your attention?

22 A. Well, Mr. Piccinini had asked me if I knew about that

23 fact before Dan's resentencing or was Dan the one who brought

24 that up, I don't know either way. Based on the transcript -- I

25 can't say I have a clear memory of talking about it, but it

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1 sure seems to me that's something Dan and I had probably talked

2 about before the resentencing.

3 Q. Now, after the resentencing, did you have any contact

4 with Mr. Hines, either by letter or phone conversation at any

5 point after the resentencing?

6 A. Not that I can recall.

7 Q. And you testified that you did have several conversations

8 with Mrs. Hines, but you just can't recall the gist of them,

9 outside the motorcycle?

10 A. Yes, the motorcycle sticks in my mind because I had a lot

11 of conversations with her about that.

12 Q. But no independent recollection about any conversations

13 about an appeal?

14 A. That's correct.

15 Q. And you mentioned before that in the first appeal, was

16 the gun enhancement appealed in the first appeal?

17 A. Well, I went back and looked, and what it appears to be

18 is that was a point in time where the Third Circuit was

19 basically, had been putting a stay on any case that was filed

20 that was raising a Blakely issue, because the Supreme Court at

21 the time had the Booker case pending. And the order from the

22 Third Circuit remanding for resentencing refers to a letter

23 received from our office that the Third Circuit was going to

24 treat as an unopposed motion for resentencing based on the way

25 the Third Circuit had decided to handle any pending sentencing

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1 case that had a Blakely issue. So nothing on the merits was

2 ever briefed to the Third Circuit.

3 Q. And the Third Circuit didn't decide anything on the

4 merits on that issue?

5 A. That's correct.

6 Q. All right. And, again, according to your testimony and

7 based on your experience of over 10 years as an Assistant

8 Federal Public Defender, you did not believe it was a frivolous

9 issue, correct?

10 A. That's correct, yes.

11 MR. MEAD: That's all I have, your Honor.

12 THE COURT: Do you have anything else?

13 MR. PICCININI: Yes, your Honor.

14 REDIRECT EXAMINATION

15 BY MR. PICCININI:

16 Q. Counsel, with regard to the real impact of this

17 particular weapons enhancement from a sentencing standpoint, do

18 you recall that regardless of weapons enhancement in this case

19 and regardless of the Sentencing Guidelines, this was a case

20 where there was a 120 month or a 10-year mandatory sentence?

21 A. Yes, I recall that, that's what I argued for at the

22 resentencing.

23 Q. That any increase above the 120 months wasn't necessary

24 to meet the needs of sentencing, so you knew at the time 120

25 was it, Mr. Hines knew that a 120 months was the mandatory

1 minimum?

2 A. Yes.

3 MR. PICCININI: That's all I have, your Honor.

4 MR. MEAD: Nothing further, your Honor.

5 THE COURT: Mr. Patton, with respect to -- has it
6 ever been your practice to file an appeal without consultation
7 with your client?

8 THE WITNESS: No.

9 THE COURT: Mr. Hines testified, as I think was
10 phrased in a question by Mr. Piccinini, that immediately after
11 the second sentencing, he said let's try it again. Is it you
12 have no recollection of the conversation at all or is it that
13 your best recollection is that that conversation never
14 occurred?

15 THE WITNESS: That I have no recollection at all.

16 THE COURT: In other words, would it be accurate
17 from my standpoint, when you say I don't recall the
18 conversation, I should not construe from that the likelihood
19 that it did not occur?

20 THE WITNESS: Correct.

21 THE COURT: You simply don't know one way or the

22 other?

23 THE DEFENDANT: I'm not saying that you should

24 conclude that it did occur or that it did not, I just don't

25 remember.

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1 THE COURT: All right. Thank you, very much.

2 MR. PICCININI: Your Honor, if I could follow-up on

3 one of the questions you had here.

4 FURTHER REDIRECT EXAMINATION

5 BY MR. PICCININI:

6 Q. Mr. Patton, with regard to your consultation with clients

7 on the issue of whether to appeal, if there is a non-frivolous

8 issue that could be appealed, would you file an appeal on

9 behalf of your client even if you thought the likelihood of

10 success wasn't great, as long as it was not frivolous?

11 A. Sure. Even if it's frivolous, we have to file the notice

12 of appeal.

13 Q. Because the request is made by your client?

14 A. Right.

15 MR. PICCININI: All right, that's all I have, your

16 Honor.

17 MR. MEAD: No further questions, your Honor.

18 THE COURT: Thank you, Mr. Patton.

19 MR. MEAD: Your Honor, Mrs. Hines is in the
20 courtroom, I would like to call her just for that one issue
21 that has come up.

22 THE COURT: All right, have her come up.

23 DEPUTY CLERK: Can you state your full name for the
24 record?

25 THE WITNESS: Mary Ann Hines.

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1 DEPUTY CLERK: Raise your right hand, please.

2 MARY ANN HINES, DEFENSE WITNESS, SWORN

3 DIRECT EXAMINATION

4 BY MR. MEAD:

5 Q. Ma'am, please state your name?

6 A. Mary Ann Hines.

7 Q. Remember to speak into the microphone, if you can.

8 Mrs. Hines, are you the mother of Dan Hines, who is in the
9 courtroom here today?

10 A. Yes, I am.

11 Q. One of the issues that came up, Mrs. Hines, involved
12 conversations that you had with Mr. Patton; do know who Mr.
13 Patton is?

14 A. Yes, I do.

15 Q. Keep your voice up. And that was your son's lawyer,
16 correct?

17 A. Yes.

18 Q. Do you recall ever having a conversation with Mr. Patton
19 involving whether or not an appeal had been filed?

20 A. Yes, I do.

21 Q. Why did you contact Mr. Patton about whether an appeal
22 had been filed?

23 A. Because Dan asked me to.

24 Q. And at that point did you contact Mr. Patton?

25 A. Yes, I did.

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1 Q. And what did you say to Mr. Patton?

2 A. I asked him if he had filed an appeal for Dan. And he
3 told me no, that he didn't. I said well, why because Dan

4 thought you were. He said well, because it wouldn't be worth
5 it, he said it wouldn't do him any good.

6 Q. Do you recall when this conversation occurred?

7 A. I'm thinking that it might have been in the spring, early
8 part of summer. I think between March and April sometime.

9 Q. You don't have a specific recollection of the date?

10 A. No, I don't. I just know that it was still really cold
11 and snowy out. So it has to be probably sometime in March,
12 later part of March, first part of April.

13 Q. Did you then inform your son of this conversation?

14 A. Dan called me, he always calls me on Monday, Wednesday
15 and Fridays. And he asked me if I called Mr. Patton, and I
16 said yeah. He says am I getting an appeal, and I said no, Mr.
17 Patton said he didn't file one because he felt it wouldn't be
18 worth it.

19 Q. What was Dan's reaction?

20 A. Very upset.

21 MR. MEAD: That's all I have, your Honor.

22 THE COURT: All right, Mr. Piccinini.

23 CROSS-EXAMINATION

24 BY MR. PICCININI:

25 Q. Ma'am, was that the only conversation you had with Mr.

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1 Patton when you called him in what you believe was late March,
2 early April?

3 A. You mean just that particular thing?

4 Q. That particular issue?

5 A. Yeah.

6 Q. How about the motorcycle that you discussed with Mr.

7 Patton on several occasions, did you bring up that issue?

8 A. On that same day -- I don't remember. I know I called

9 him different times to getting his advice on what I should do

10 next because they just wouldn't release it to me. So he said

11 if it was him, he would get a lawyer, and get the bike back for

12 me. So that's what I did.

13 Q. In your conversations with your son prior to March or

14 April, would you agree with me that you called Mr. Patton

15 directly after close in time to when your son told you to call

16 Mr. Patton?

17 A. That's right.

18 Q. You didn't wait several months to call Mr. Patton about

19 that issue?

20 A. When Dan told me is when I called.

21 Q. And you would agree with me that prior to March and

22 April, from September, October, November, December, January,

23 February, that at no point in time did your son discuss with

24 you that he had asked Mr. Patton to file an appeal, isn't that

25 true?

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1 A. Can I say something?

2 THE COURT: Answer the question first. Repeat the
3 question, please.

4 BY MR. PICCININI:

5 Q. Would you agree with me that from the time that he was

6 sentenced in August, so that would be September, October,

7 November, December, January, February, you would agree with me

8 that at no time during that period, did your son tell you that

9 Mr. Patton was supposed to file an appeal on his behalf?

10 A. Dan talked to me different times about it, so I would

11 have to say yes, he felt Mr. Patton did.

12 Q. About what?

13 A. Filing an appeal.

14 Q. When did he start talking to you about it?

15 A. Dan has always talked about it, from the last time he got

16 his sentence. So then finally he didn't get anything, he said,

17 mom, will you call Mr. Patton and ask if my appeal was filed.

18 Q. Why didn't you call him months earlier if Dan was telling

19 you --

20 A. Dan didn't ask me to until that particular time, he was

21 just waiting for it to happen.

22 Q. Well, if you had several conversations with Mr. Patton

23 about the motorcycle incident, all before March and April,

24 would you agree with me that you talked with Mr. Patton on a

25 lot of occasions about that motorcycle?

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1 A. Uh-huh.

2 Q. At the same time you're indicating now that your son told

3 you he was supposed to have an appeal filed, how come you

4 didn't bring up the appeal in all your conversations with Mr.

5 Patton about the motorcycle?

6 A. I don't know, I just thought he was working on it.

7 Q. Wouldn't he have told you something about the appeal?

8 A. Danny?

9 Q. No, Mr. Patton, in your conversations with him?

10 A. No, he wouldn't because that's not what I was addressing.

11 Q. Did your son tell you about the filing of this, what's

12 known as a motion to vacate sentence, a Habeas petition that he

13 filed, did he tell you that he was doing that?

14 A. You mean that he did himself, yes. I know he was doing

15 it, he started that after Mr. Patton told me he didn't.

16 Q. How did your son tell you that he knew about the filing

17 of this thing?

18 A. He found out from where he's at, he got help there.

19 Q. What did he tell you he hoped to do by filing this

20 motion?

21 A. Get the gun enhancement taken off so he could go to the

22 drug program.

23 Q. He told you specifically about the benefits he would get

24 with regard to the drug program?

25 A. Yes. Dan told me that if he could get this gun

1 enhancement off, he would get, to be able to get more time off

2 for the drug program.

3 Q. Did you review, did he send it to you in any regard to

4 look at it?

5 A. No, I never saw it.

6 Q. When Mr. Patton was representing your son prior to him

7 being convicted, did you stay in touch with Mr. Patton

8 throughout the entire case?

9 A. Most of the time. If Danny would like have a question or

10 whatever, he would have me call Mr. Patton. But I tried not to

11 bother him much because, you know, he is busy. He'd either be

12 out and I'd have to talk to his secretary or something like

13 that.

14 Q. Mr. Patton was responsive to your questions, he was the

15 type of attorney who worked hard on behalf of your son?

16 A. Yes, he did, we were happy with him.

17 Q. Do you remember after the first sentencing when your son

18 got 140 months?

19 A. I remember.

20 Q. And were you part of any discussions that an appeal would

21 be filed after he got the 140 months?

22 A. Yes.

23 Q. And do you recall that the appeal was filed very quickly
24 after that sentencing?

25 A. I know.

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1 Q. And Danny got notice of that, didn't he?

2 A. Yes.

3 MR. PICCININI: That's all I have, your Honor.

4 THE COURT: All right, anything else?

5 MR. MEAD: Just one point.

6 REDIRECT EXAMINATION

7 BY MR. MEAD:

8 Q. Did you testify that in your conversations with Dan after
9 the resentencing, he was under the impression that an appeal
10 had been filed, correct?

11 A. Yes.

12 Q. So he had thought Mr. Patton had filed an appeal for him
13 after the second sentencing?

14 A. Yes.

15 Q. It was only as time went on that he asked you to inquire
16 about it?

17 A. Right, he'd just say well, I hope my appeal goes through.

18 I thought actually it was being worked on.

19 MR. MEAD: Thank you, that's all I have.

20 THE COURT: Thank you, ma'am, you can step down.

21 MR. MEAD: I have nothing further, your Honor.

22 MR. PICCININI: Your Honor, I do have one issue, I
23 don't know if it's relevant to your decision making today. The
24 content of this file has been turned over to current defense
25 counsel. In light of the defendant's testimony, I think Mr.

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1 Patton is correct, that I wanted information concerning the
2 appeal of the resentencing. But the claims about how long the
3 defendant waited before filing the Habeas, talked to his
4 mother, and his claims the first time he appealed it was months
5 and months before he got the documentation, it seems to me
6 information that would be refuted by the record.

7 THE COURT: Do you want to look at the file?

8 MR. PICCININI: Yes, I'd like to see what's in
9 there. And I also wonder, to the extent because we now hear
10 today that there were conversations with the mother, whether

11 there's any phone records or documentation concerning phone
12 calls with the mother that counsel, Mr. Patton, would not have
13 known are relevant today.

14 THE COURT: Do you have the file, Mr. Mead?

15 MR. MEAD: I do, your Honor, it's in my office. I
16 could go get it and bring it back.

17 THE COURT: How big is it, is it a thick file?

18 MR. MEAD: It's fairly thick, I picked it up last
19 night. Now, a lot of it won't be relevant, a lot of it
20 involves another drug case, I believe, there are search
21 warrants, things like that in the file. I don't know how much
22 is really relevant, but it's a fairly big file.

23 THE COURT: All right, let's do this, let's recess
24 until 11:15. That will give you an opportunity to get the file
25 to him. Do you want to say something, Mr. Patton?

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1 MR. PATTON: Well, your Honor, obviously, I'm not a
2 party here, but this is part of the file from our office that's
3 involved here. I understand the point that Mr. Piccinini is
4 making, I don't believe he needs to review the entire file.

5 THE COURT: Neither do I.

6 MR. MEAD: Your Honor, could we have Mr. Patton
7 review the file, that might be easier.

8 THE COURT: I suspect that there's 98 percent or 99
9 percent of that file is completely irrelevant.

10 MR. PICCININI: Your Honor, if I could be heard on
11 this. Mr. Hines cannot have it both ways. Nor should Mr.
12 Patton be the one reviewing the file for the government's
13 determination as to what's relevant to us defending Mr.
14 Patton's ineffectiveness. Mr. Hines has clearly waived the
15 attorney-client privilege with regard to this matter. Any
16 notes or files or documents, I'm not interested in looking at
17 the search warrants. I'm interested in anything in that file
18 that is relevant to Mr. Hines' current claim that he appealed.
19 And information related to the history of this particular
20 appellate process. Because Mr. Hines testified directly to
21 when he got notice, how he had received notice the first time
22 around. There's now a claim that there were phone
23 conversations. We know that there are e-mails where this
24 matter was discussed. There are some claims with regard to Mr.
25 Hines having to describe for Mr. Patton the ramifications of

1 the weapon enhancement. And Mr. Patton just doesn't recall a
2 lot of those details, and recognizably so. But Mr. Hines just
3 can't have it both ways, judge. If he's going to claim
4 ineffectiveness of counsel, then he's waiving the
5 attorney-client privilege with regard to the content of that
6 file. I'm not interested in anything else other than this
7 particular case. But I ought to be able to see the documents
8 to decide if on behalf of the government whether or not the
9 documents are relevant.

10 MR. PATTON: You may have found he has waived the
11 privilege with regard to the issue in this case, whether or not
12 there was a request for an appeal. I don't think that
13 necessarily equates to a finding he waived the attorney-client
14 privilege on a blanket waiver.

15 THE COURT: He has waived the attorney-client
16 privilege on any document which could circumstantially support
17 or not his position that the conversation occurred, the way
18 that he said it occurred. Now, I have no idea what's in the
19 file. But you do, Mr. Patton, you put it together.

20 Specifically, you are looking for any correspondence. See,
21 this is why it's impossible to speculate what's there, if you
22 don't know what's there.

23 MR. PATTON: I believe there's a separate file for
24 the first sentencing. Because that was not handled by me, that
25 was handled by Ms. Gerlach out of the Pittsburgh office. And

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1 so there's a part of the file that's all stuff from my original
2 representation of Dan, all the way through the first
3 sentencing. Separate within there is a separate folder, that
4 has the stuff from the first sentencing. Then there's a folder
5 that has the stuff for the resentencing. And actually copies
6 of the e-mails didn't come out of the paper file, we went back
7 through -- that was just saved on the computer. That wasn't a
8 piece of paper that existed in the files. It was a sent e-mail
9 that was in memory. But I understand what Mr. Piccinini is
10 looking for and I understand you found he waived the
11 attorney-client privilege with regard to this issue and
12 anything in the file that is relevant to this issue, but I
13 don't believe turning the entire file over to the U.S.

14 Attorney's Office, for them to look through the whole thing, is
15 the appropriate way to determine whether or not there is
16 something responsive to the particular issue.

17 THE COURT: Well, you're the custodian of the file
18 right now, what do you say?

19 MR. MEAD: Your Honor, I looked through the file,
20 there's no smoking gun in there. Honestly, on the one hand I'm
21 saying look at it, I don't care. On the other hand, I
22 understand Mr. Patton position, he doesn't want to start a bad
23 precedent. But as far as this client is concerned here today,
24 I don't have a problem because there's nothing in there that's
25 going to hurt us. That's how I feel. But, again, I understand

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1 Mr. Patton's position because he doesn't want a bad pattern.

2 MR. PICCININI: Your Honor, Mr. Patton is a fact
3 witness here today, he doesn't have a dog in this fight at all.
4 The privilege is Mr. Hines', not Mr. Patton's. Mr. Hines has
5 waived the privilege by setting forth counsel's
6 ineffectiveness.

7 THE COURT: The privilege is Mr. Hines to waive or

8 not. But this is the way to solve this, although, I thought

9 largely it had already been solved. Mr. Mead, to the extent

10 that there has not already been a waiver and I think that there

11 has been a waiver for the reasons I previously put on the

12 record, does your client consent to Mr. Piccinini's review of

13 his file for the reasons stated on the record by Mr. Piccinini?

14 MR. MEAD: May I consult, your Honor?

15 THE COURT: Yes.

16 (Discussion held off the record between the

17 Defendant and Defense Counsel.)

18 MR. MEAD: My client is willing to waive it, your

19 Honor.

20 THE COURT: All right. Produce the files to him and

21 as soon as you're done reviewing them, if you can get it done

22 by 11:15 or thereabouts, we'll conclude this.

23 (Recess from 10:22 a.m.; until 11:05 a.m.)

24 THE COURT: Mr. Piccinini.

25 MR. PICCININI: Your Honor, I have reviewed the file

1 and I would request the opportunity to recall Attorney Patton

2 to the stand with regard to the documents I found in that file.

3 THE COURT: All right.

4 THOMAS W. PATTON, GOVERNMENT WITNESS, PREVIOUSLY SWORN

5 DIRECT EXAMINATION

6 BY MR. PICCININI:

7 Q. Mr. Patton, I've had the opportunity to review the Public

8 Defender's file and there are several documents that I wanted

9 to present to you and ask you questions about, that have become

10 relevant to today's hearing.

11 MR. PICCININI: First of all, I've already marked

12 Government Exhibit 1, I would ask for the admission into

13 evidence of Government Exhibit 1.

14 THE COURT: It's admitted.

15 BY MR. PICCININI:

16 Q. It's a previous e-mail communication between your office

17 here in Erie and your Pittsburgh office concerning an e-mail

18 that you sent to the Pittsburgh office or had sent to your

19 Pittsburgh office concerning the fact that there would be no

20 appeal taken after Daniel Hines' resentencing. Do you recall

21 that?

22 A. I recall the exhibit.

23 Q. Just going through the file with regard to the original

24 sentencing, let me show you what I have marked as Government
25 Exhibit 2 for identification. Can you identify Government

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1 Exhibit 2?

2 A. This is a copy of -- actually a series of e-mails, with
3 the original e-mail being replied to and that reply being
4 replied to. The original e-mail was sent by Elizabeth Durkin,
5 my secretary, on 11/24/04, stating that "we've had the
6 following sentences recently in Erie. Karen, I believe Tom has
7 talked to you about the ones which need appeals; Linda, I gave
8 you the case number of these, too. I'll be sending the files
9 down to Pittsburgh for Hines," and there was another case. And
10 then it lists the sentencings that have occurred, the case
11 name, sentencing date. The date that judgment was docketed,
12 that starts the 10 days for the filing of the notice of appeal.
13 And then a column whether or not there will be an appeal.
14 Within that is an entry for Daniel Ray Hines with a 11/22/04
15 sentencing date, unknown for the date that the judgment was
16 docketed. And then stating yes, as to whether or not there
17 would be an appeal. Then states "I'll put a copy of this in

18 the respective files. Let me know if you need any more info in
19 the meantime."

20 Q. All right. Let me show you the original of the document
21 that I obtained from your file, and reviewing both Government
22 Exhibit 1 and the document I've obtained from your file, which
23 I'm not going to mark as an exhibit, does it appear that I've
24 redacted sections of Government Exhibit 2 from the original
25 that referred to other particular defendants?

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1 A. That's correct.

2 Q. And as you review the unredacted version, is it accurate
3 to say, just from a policy standpoint that, as you testified
4 earlier concerning your procedure at the resentencing, after
5 the original sentencing, it was the policy for your office to
6 send an e-mail from Erie to your appellate division in
7 Pittsburgh setting forth whether or not an appeal should be
8 filed or would be filed in a particular case?

9 A. I'm sorry, is that consistent with my prior testimony?

10 Q. No, is that consistent -- it is your office's policy to
11 send an e-mail from Erie to Pittsburgh and list for them recent

12 sentencings and whether appeals should be filed?

13 A. Yes.

14 Q. And as you testified earlier with regard to the e-mail

15 that was sent after the resentencing, Government Exhibit 2, is

16 a redacted version of the e-mail that was sent concerning the

17 original sentencing?

18 A. That's correct.

19 Q. And on this particular document, Government Exhibit 2,

20 although, on the first page it's kind of a chart form, it says

21 case name, sentencing date, date judgment is docketed, and an

22 appeal with two question marks next to it. Underneath that

23 would be the list of the defendants' names, the judgment date,

24 the sentencing date, and in words yes or no as to whether an

25 appeal would be filed?

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1 A. That's correct.

2 Q. In this particular instance, is it accurate to say on

3 this date, which was November 24, 2004, you sent to your

4 Pittsburgh appellate division a list of four defendants' names?

5 A. Correct, my secretary, Elizabeth Durkin did.

6 Q. And with both the sentencing dates, the judgment dates,
7 and then next to it there were two defendants for which appeals
8 would be filed, and two defendants where it was written no
9 where appeals would not be filed?

10 A. That's correct.

11 Q. After the first sentencing, there was a yes with regard
12 to Mr. Hines' sentencing?

13 A. That's correct.

14 Q. Or excuse me, appeal.

15 MR. PICCININI: Your Honor, I would request the
16 admission into evidence of Government Exhibit 2.

17 THE COURT: It's admitted.

18 BY MR. PICCININI:

19 Q. Now, in addition, with regard to the procedures that are
20 employed from your office after a particular sentencing, you
21 indicated and you testified earlier that some sort of notice or
22 letter would be sent to a defendant if an appeal was filed on
23 their behalf; do you recall that testimony?

24 A. Yes, I believe I testified that I couldn't say exactly
25 what our Pittsburgh office would do, but if it was an appeal I

1 was going to handle out of the Erie office, we would send a
2 copy of the notice of appeal that had been filed in the case to
3 the client at the time the notice of appeal was filed.

4 THE COURT: Just as a matter of clarification, are
5 the actual, for instance, on a case like Mr. Hines or any other
6 case that you would have handled here, but then is referred
7 down there, would the actual notice of appeal be filed by
8 Pittsburgh or would it be filed by you?

9 THE WITNESS: It depends, your Honor. Part of the
10 process we go through is once we see whether there are going to
11 be appeals or not, if there are going to be appeals, we then
12 kind of do some talking about who physically is going to handle
13 the appeal. If Karen Gerlach or one of the other appellate
14 attorneys in Pittsburgh is going to physically handle the
15 appeal, they file the notice of appeal, so they can try and
16 time it with other cases that they're handling. If I'm going
17 to handle the appeal, then my office in Erie would file the
18 notice of appeal.

19 THE COURT: So you wouldn't just file one to toll it
20 and then let them handle the appeal, as a general proposition?

21 THE WITNESS: As a general proposition, no, that's
22 not the way it would be handled. Because they like to file the
23 notice of appeals in cases they're going to do, so that Karen
24 and her secretary can try and time the filing of the notice of
25 appeal to have as much control as they can over when the

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1 briefing schedule is going to be.

2 THE COURT: Then my last question is on the original
3 Hines sentence back on November 22nd, did you file the notice
4 of appeal?

5 THE WITNESS: I don't recall, I believe Mr.
6 Piccinini actually has the notice of appeal. I believe it was
7 filed by the Pittsburgh office.

8 THE COURT: Go ahead.

9 BY MR. PICCININI:

10 Q. Counsel, in that regard the sentence, the original
11 sentence of Mr. Hines occurred on November 22, 2004. I'm going
12 to show you what I have marked as Government Exhibits 3 and 4,
13 if you could identify these. First of all, Government Exhibit
14 3, does this appear to be a letter from your Pittsburgh office

15 to Mr. Hines?

16 A. Yes, this is from the Pittsburgh office. There is a
17 different letterhead that they use than the letterhead that we
18 use out of the Erie office.

19 Q. What's the nature of this letter addressed and mailed to
20 Mr. Hines on December 1st of 2004, within 10 days of his
21 original sentencing?

22 A. It's a letter, it's from Karen Gerlach. Again, who is
23 the Assistant Federal Public Defender that's in charge of our
24 appellate division. That basically is introducing herself to
25 Mr. Hines because she would not have before this point in time

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1 had any contact with Mr. Hines. The letter kind of lays out
2 how the appellate process will proceed with the filing of the
3 notice of appeal. The filing of briefs. And then the setting
4 of a tentative argument date, and then a notice as to whether
5 or not there actually will be an oral argument, which of course
6 would be up to the Court of Appeals. That's what it explains.
7 Q. This is your appellate division just identifying
8 themselves to the defendant within 10 days of the sentencing,

9 and do they attach to that what I would have marked as

10 Government Exhibit 4?

11 A. Well, the letter doesn't say that there's an enclosure.

12 I don't know if it mentions it in the body --

13 Q. Whether it's attached or not, I think it's not very clear

14 in here. But is Government Exhibit 4, the notice of appeal

15 filed by Karen Gerlach in your Pittsburgh office on December 1,

16 2004?

17 A. Yes, it's a copy of that.

18 Q. So the date that the letter goes out to Mr. Hines is the

19 same date that the notice of appeal is filed?

20 A. That's correct.

21 Q. In your experience in the appeals that you've handled on

22 behalf of the office, would you send out a similar letter to a

23 defendant and give them a copy or at least notify them in some

24 way that an appeal has been filed?

25 A. I would let them know that the notice of appeal was

1 filed. It wouldn't be the same letter, I wouldn't have the

2 need to introduce myself to the client because I had already

3 represented them. Generally, the letters I send out don't have

4 that general explanation of the appellate process because it's

5 somebody that I have personally handled their case, chances are

6 I've already talked with them, to give them a general outline

7 of how the appellate process would work.

8 Q. After the original sentencing, what I've shown to you as

9 Government Exhibit 3 at least, is a copy of the correspondence

10 sent by the Federal Public Defender's Office to Mr. Hines after

11 the first sentencing?

12 A. That's correct.

13 Q. Now, do you recall sending any correspondence to Mr.

14 Hines or there being any correspondence sent to Mr. Hines from

15 the Public Defender's Office after the resentencing?

16 A. I don't have any memory of doing that. But I know that

17 you showed me a letter before I came up here that indicated

18 that we had sent him the amended judgment in the case, that

19 would be normal after any sentencing or resentencing. My

20 office would send out a letter with the judgment enclosed.

21 Q. In this case the resentencing occurred on August 2, 2005.

22 I'm going to show you what I have marked as Government

23 Exhibit 5 for identification, can you identify Exhibit 5?

24 A. That is a letter dated August 10, 2005, from myself to

25 Mr. Hines, addressed to the Crawford County Correctional

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1 Facility, stating that "enclosed is a copy of an amended
2 judgment with regard to your case." With my signature.

3 Q. And with regard to Government Exhibit 5, having read
4 through it, is there any reference in here to the appeal that
5 you would be filing on behalf of Daniel Hines, as he had
6 requested you supposedly to do on August 2, 2005?

7 A. The letter does not refer to an appeal.

8 MR. PICCININI: Your Honor, I would request the
9 admission into evidence of Government Exhibits 3, 4 and 5.

10 THE COURT: They're admitted.

11 BY MR. PICCININI:

12 Q. Mr. Patton, in the Public Defender's file or the
13 defendant's file in this case, there are several instances
14 where you received phone notes from various people for you to
15 return calls. One from Special Agent Petyak concerning the
16 return of some items he has in evidence. And specifically one
17 with regard to or from the defendant's mother. Did you
18 specifically or did you regularly keep either phone notes from

19 calls that you were returning or notes of your conversations
20 with people when they called in about a particular case?
21 A. I don't have any standard practice to taking notes of
22 phone calls. Sometimes I'll write something down, it could be
23 on the back of a phone message slip or on a piece of legal pad,
24 sometimes I do, sometimes I don't.
25 Q. And specifically with regard to Mrs. Hines, having

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1 reviewed the fact that you had sent a notice or a letter to the
2 defendant giving him a copy of his judgment within 10 days of
3 his resentencing, does that refresh your recollection at all
4 with regard to any conversations you had with his mother where
5 she complained that an appeal hadn't been filed on her son's
6 behalf?

7 A. No.

8 Q. The same with regard to your discussions with the
9 defendant, if you had any discussions after his resentencing,
10 does the fact that you sent him this letter within 10 days of
11 his resentencing cause you to recall at all whether you had any
12 specific discussions with Mr. Hines where he made it clear to

13 you that he wanted an appeal to be filed?

14 A. No. But, you know, if we talked about an appeal and he

15 thought he asked me to do it and I didn't clarify that with him

16 one way or the other, then that's my fault for not clarifying

17 it with him.

18 Q. Well, counsel, I heard you explaining that to Mr. Mead

19 before we came in, that you were explaining to Mr. Mead, as he

20 is prosecuting this action, explaining to him, so that he knew

21 for purposes of his argument today, that it's your

22 responsibility to clarify that with the defendant. I know that

23 you likely have made sure that you're clear that you believe

24 that's your responsibility. My question is whether you have

25 any specific recollection of Mr. Hines asking you to file an

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1 appeal?

2 A. No, I don't.

3 Q. If Mr. Hines asked you to file an appeal sitting here in

4 this courtroom, counsel, why didn't you file an appeal on his

5 behalf?

6 A. If he asked me to file it and I did not file it, I would

7 have no good explanation for why that did not happen.

8 Q. You can't say whether it ever happened?

9 A. No, I can't.

10 Q. You can't recall ever an instance as a Federal Public

11 Defender someone asking you to file an appeal and you being a

12 zealous advocate for your client failing to do so; you don't

13 recall that ever happening, do you?

14 A. No, I had one other client make a very similar claim to

15 this, it was out of a Pittsburgh case that I handled and

16 actually my testimony was a lot like it was today. I just

17 didn't recall, just didn't recall whether or not it happened.

18 So I don't ever recall knowingly having someone tell me I want

19 to appeal and then just saying -- and then not filing an

20 appeal. I've never knowingly done that.

21 Q. And here you can't refute -- you have no recollection of

22 this supposed conversation ever happening here in the

23 courtroom?

24 A. No. I mean I'm sure I talked with Dan after the sentence

25 was imposed, like I said, that would just be a normal thing.

1 But I do not have any independent recollection of the content
2 of any conversation.

3 Q. And if the content included the filing of an appeal,
4 counsel, you would have filed an appeal?

5 A. If I understood Dan to be telling me I want you to file
6 an appeal, I would have filed an appeal.

7 Q. And when you sent your letter within 10 days of that
8 resentencing, if you were asked to file an appeal, wouldn't the
9 letter have made some reference to the status of the appeal?

10 A. If I had thought that Dan asked me to file an appeal, I
11 don't know if it would have been referred to in that letter or
12 not, because even in cases where there's going to be an appeal,
13 I let the Pittsburgh office know that, even if they're going to
14 handle the appeal, I would have sent out a letter virtually
15 identical to the letter I sent to Dan in this case, saying
16 here's the amended judgment in your case. I send that out
17 whether there's going to be an appeal or not.

18 Q. Do you think you did that in the first sentencing, even
19 though an appeal was filed within 10 days?

20 A. Yes, I would think that there should be a letter after
21 the first sentencing, sending Dan the judgment that was entered

22 by Judge McLaughlin. It's our standard practice to always send
23 a copy of the judgment to a client, regardless if there's going
24 to be an appeal or not. And we do that whether or not, even if
25 there's going to be an appeal that the Pittsburgh office is

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1 going to handle, it would be my office that would send out a
2 copy of the judgment.

3 Q. Counsel, in your representation of your clients after
4 they've been sentenced, do they have access to telephone
5 facilities in the federal Bureau of Prisons?

6 A. They can call collect.

7 Q. Can they call the Public Defender's Office?

8 A. Sure.

9 Q. And have you or do you receive collect calls from former
10 clients or individuals who are incarcerated when they want to
11 talk to you?

12 A. Yes.

13 Q. After the sentencing or resentencing in this case, did
14 Daniel Hines ever call you collect from any prison facility to
15 complain about the fact that you hadn't filed an appeal?

16 A. I don't believe so.

17 MR. PICCININI: That's all I have, judge.

18 THE COURT: Okay. Mr. Mead.

19 CROSS-EXAMINATION

20 BY MR. MEAD:

21 Q. Mr. Patton, you were asked a question from Mr. Piccinini

22 referring to your responsibility -- what was that comment, I'm

23 sorry, he sort of said something and went to another question?

24 A. I believe what I had said was that it's up to me to

25 determine whether the client wants to appeal or not. And if I

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1 don't, in my opinion, if I don't do a sufficient job so that I

2 know whether or not it's clear to me whether or not the person

3 wants to appeal or doesn't want to appeal, then I haven't done

4 my job right.

5 Q. If you had spoken directly to Mrs. Hines, there would be

6 no phone message from your secretary, correct, you would have

7 just talked to her directly?

8 A. That's true, sometimes I answer the phone directly

9 myself. And if that were the case, there would be no message.

10 Q. So whether or not there is a message from Mr. Hines

11 written on a piece of paper is not indicative of whether or not

12 you had a conversation?

13 A. No.

14 Q. Am I correct?

15 A. Yes.

16 MR. MEAD: Okay. May I see the exhibits, your

17 Honor.

18 THE COURT: Yes.

19 BY MR. MEAD:

20 Q. The letter of August 10, 2005, enclosing the amended

21 judgment, am I correct probably that your secretary drafted

22 that and you just signed it?

23 A. Yes, that is a common letter, that after every sentencing

24 she'll actually pick up the judgments from, we have a mailbox

25 at the Clerk's Office here in the courthouse. The judgments

1 get put in that box, my secretary will come down, she comes

2 down everyday to check to see what we got in there. If there

3 are judgments in there, she takes them back to the office, does

4 up this standard letter and puts it in my box to just sign.

5 Q. The fact there is not any mention of an appeal one way or

6 the another is not indicative of what Dan may have said to you

7 on the date of the resentencing, correct?

8 A. Yes, with that particular letter, even if there was going

9 to be an appeal and I was going to be the attorney handling it,

10 there wouldn't normally be -- well, I don't want to overstate

11 it, it's possible I would put something in there about

12 there's -- you know, the notice of appeal has been filed, we're

13 going to file it, I wouldn't necessarily put that in, that is

14 just kind of a standard letter that goes out. And I have to

15 say with the letters, sometimes we send them to clients, we

16 send them to the institution that we believe they're housed in,

17 sometime they've been moved and come back saying, you know, the

18 inmates no longer here, then we have to figure out where our

19 client actually is and then get it to that institution.

20 Q. Because they're being transported to the prison, you're

21 not sure when they're going to arrive?

22 A. Right, like the one letter I believe is addressed to Dan

23 at the Crawford County Correctional Facility, because Dan had,

24 while he was there for the original sentencing, may have been

25 after the resentencing, he had pending charges in Crawford

1 County. If you send a letter to the institution and the
2 inmate's no longer there, they don't try to figure out, the
3 institution doesn't try and figure out where the person is and
4 forward it on, they just send it back to the office. And then
5 we have to figure out physically where our client is. Then
6 resend the letter, to get it out.

7 Q. Exhibit 3, which is the letter from your Pittsburgh
8 office to Mr. Hines, is in care of the Erie County Prison,
9 correct?

10 A. Sure.

11 Q. So there was no letters directly to Mr. Hines at the
12 federal institution where he was incarcerated, to your
13 knowledge?

14 A. Not in those exhibits. There might have been some
15 further along in the original, the appeal of the original
16 sentence that were sent to Dan in the federal facility.

17 Q. But not in any of those exhibits that you just saw?

18 A. That's correct.

19 MR. MEAD: That's all I have, your Honor.

20 REDIRECT EXAMINATION

21 BY MR. PICCININI:

22 Q. In that regard, counsel, was there any indication in the
23 file that the letter that was specifically talked about, was
24 sent back to the Public Defender's Office to be resent out
25 again with a different address?

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1 A. I haven't gone through the file looking for it, but it
2 would not be uncommon. We'll get it back unopened with -- most
3 of the facilities have like a sticker that they just throw on
4 there, it says inmate no longer here. We don't as a practice
5 keep those.

6 Q. We talked a lot in generalities today, but my question to
7 you, counsel, is you don't know if such a thing happened with
8 regard to Mr. Hines?

9 A. I do not.

10 Q. With regard to someone who would be sentenced on November
11 22, 2005, in your experience, is it likely that he made it into
12 the Marshal's system and gets on the Marshal's shuttle service
13 and makes his way to a federal prison facility within 10 days?

14 A. No.

15 MR. PICCININI: That's all I have, your Honor.

16 MR. MEAD: Nothing further, your Honor.

17 THE COURT: Thank you, Mr. Patton. Did you move all
18 of your exhibits, Mr. Piccinini?

19 MR. PICCININI: Your Honor, if I hadn't moved all
20 those, I would move Government Exhibits 1 through 5.

21 THE COURT: They're admitted. Anything else by way
22 of documentary evidence or oral testimony?

23 MR. MEAD: No, your Honor.

24 THE COURT: Do you want to sum up here?

25 MR. MEAD: If I may, your Honor. Your Honor, as I'm

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1 sure the court is aware that the Third Circuit recently
2 clarified the rule regarding a failure to appeal in a case
3 entitled Harrington_v._Gillis.

4 THE COURT: Don't be so sure.

5 MR. MEAD: I have a copy. It is a recent case, your
6 Honor, it came out in July of this year.

7 THE COURT: What proposition does it stand for?

8 MR. MEAD: What it does is it defines the Strickland

9 test as it pertains to a situation which we have here, where

10 there is a failure to file an appeal, and with which the

11 defendant asks for an appeal to be filed.

12 THE COURT: What is the citation of that case?

13 MR. MEAD: 456 F.3d 118, (3rd Cir. 2006).

14 THE COURT: Does it clarify Solis in some

15 particulars?

16 MR. MEAD: Yes, it does, your Honor, I think it's

17 very relevant to the test that the court has to apply here.

18 THE COURT: This is what we're going to do.

19 Partially because I want to read the case and partially because

20 I'm still fighting the flu. But I want to read that case

21 first. Because I need to know the legal underpinning in my

22 head as I'm sifting through the facts here. So we're going to

23 take a recess here and come back, do the summations, hopefully

24 I'll be able to get something on the record after lunch. Let's

25 be back here at a quarter to one, we'll come back and we'll

1 finish up.

2 (Luncheon recess from 11:35 a.m.; until 12:55 p.m.)

3 THE COURT: All right, Mr. Mead.

4 MR. MEAD: Your Honor, I'm sure you've had a chance
5 to review the case that I had provided earlier, Harrington_v.

6 Gillis. In that case, your Honor, it seems that there are two

7 tests that they're talking about, whether or not it's

8 ineffectiveness of counsel to not appeal. The first test

9 indicates whether or not counsel actually consulted with his

10 client. And if counsel did consult with his client and the

11 client said I want an appeal, that they have to file an appeal,

12 I'm sorry, counsel has to file the appeal.

13 THE COURT: On this record, putting aside the issue

14 of whether there was a directive to appeal, I could fairly find

15 that there was some consultation relative to an appeal, could I

16 not?

17 MR. MEAD: Your Honor, if I may. I think the word

18 consult is defined in this case. I'm not sure it reached the

19 level of adequate consultation. I think there may have been

20 the discussion, but I'm not sure -- I think what would happen

21 here is in the second test, when it talks about whether or not
22 counsel consulted with his client. Consulting is defined in
23 the case as "advising the defendant about the advantages,
24 disadvantages of appeal and making a reasonable effort to
25 discover the defendant's wishes."

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1 My argument would be, set aside the first one,
2 whether or not there was a direct request to do it. Our
3 argument is yes, although, I'll go into that in a minute.
4 Let's say he did ask directly hey, let's do it again. I think
5 there is no reason he wouldn't in this situation. This is a
6 public defender, he's not going to have to pay an attorney to
7 do an appeal. He has absolutely nothing to lose by doing this
8 appeal again. I think that, combined with his mother's
9 testimony, that he thought an appeal had been filed, shows that
10 there was some credibility on his behalf.

11 Mr. Patton was candid, he says he doesn't recall
12 what happened that day. We all know Mr. Patton is a very, very
13 effective counsel, I'm certainly not begrudging him that.
14 However, he does have 80 cases a year, according to his

15 testimony. And he even said if I didn't follow up on this,
16 something along the lines that if I didn't follow-up on it,
17 it's my fault. I submit that may have been what happened here
18 in all candor. I think that we had a discussion from Mr.
19 Hines, hey, let's do it again. Mr. Patton may not have
20 interpreted that as let's file an appeal again. At that point,
21 though, your Honor, I would say that it was Mr. Patton, not Mr.
22 Hines' obligation, to follow-up on that issue. At that point
23 Mr. Hines is taken by the Marshals away from his sentencing,
24 who knows where he's going to be the next few days, he may go
25 to Erie, he may go to Crawford County, he may be anywhere.

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1 According to the case law, according to Harrington,

2 it does say that a consult involves making a reasonable effort
3 to discover defendant's wishes. I would submit even if the
4 court would find there wasn't a direct request, that there
5 wasn't a reasonable consult, either. If we get to that second
6 test, where there wasn't a reasonable consult, we have to look
7 at the last part of this test in which it says but for this,

8 was there a reasonable probability that Mr. Hines would have

9 appealed.

10 And that I think that answer is pretty clearly yes, he did want

11 to appeal.

12 THE COURT: If I were to credit your client's

13 testimony in this regard, where he indicated Mr. Patton advised

14 him that an appeal, I'm paraphrasing, the prospects of success

15 would be poor. I think his words were it wouldn't do any good,

16 you wouldn't win, something along those lines. That's a type

17 of consultation, isn't it, he was given advice?

18 MR. MEAD: Yes, he was given advice. But I'm not

19 sure that advice is enough. Because you may say to your

20 client, listen, I'm not sure we're going to win. But the

21 client, at least in my experience, is going to say well, give

22 it a shot. I mean just because you say you may not win, it's a

23 non-frivolous issue, obviously, Mr. Patton admitted that. I

24 think at this point if Mr. Hines had told him, well, let's try

25 it again, I want to try it again, he's duty bound to do it

1 again. If there was a discussion in which it wasn't clear to

2 Mr. Patton or let's do it again didn't register with Mr.
3 Patton, considering the fact that obviously it was an important
4 issue to Mr. Hines, as he's testified, there's been testimony
5 here already, this gun enhancement is important in the jail
6 situation. It may not cut his time down, but he does lose the
7 opportunity to participate, either participate in the drug
8 treatment program in prison or loses the opportunity to get a
9 year or so cut off his sentence. Obviously, this is a very,
10 very important issue to Mr. Hines.

11 Again, Mr. Patton has a lot of cases, it may have
12 slipped his mind, he may not have been clear on it. But if he
13 was told to appeal, he has to appeal it. If it was not clear
14 enough, it is Mr. Patton's obligation to talk to Mr. Hines
15 again and say what do you want to do here. Do we want to an
16 appeal. Because it is an important issue to Mr. Hines, I think
17 he made that clear. And it's brought up at the second
18 resentencing at least twice. Once it's preserved by Mr. Patton
19 at the beginning of the hearing. The second time, Mr. Patton
20 at page 15 of the transcript, brings up the fact that, listen,
21 if there's this gun enhancement, he loses the opportunity to
22 have a year cut off his sentence.

23 I would submit that under the Harrington guidelines,

24 that number one, it was ineffective because he did request it,
25 Mr. Hines did request an appeal, it was not done for whatever

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1 reason. Maybe it slipped Mr. Patton's mind. Again, we all
2 know he's a good attorney, but he does have a big case load.
3 Number two, maybe he didn't quite catch what should
4 have -- what the client wanted to do. And he had an obligation
5 under the Harrington case to follow-up on that.

6 And, again, I go back to the fact that there's
7 absolutely nothing to lose by this client asking to appeal, he
8 has nothing to lose whatsoever.

9 And, again, I would also point out that Mr. Patton
10 does not recall that conversation. We do have a specific
11 recollection from the defendant and his mother, who called and
12 said I talked to my boy, he thought the appeal was ongoing.

13 I also want to point out one fact. The fact that
14 Mr. Hines did not receive paperwork about an appeal or not an
15 appeal, I think that's irrelevant. He trusts his attorney. He
16 never at one point said that Mr. Patton didn't do a good job

17 for me or he didn't like Mr. Patton or he was a bad attorney.

18 He trusted his attorney. He thought he told him I want an

19 appeal, it was done. It was only that things didn't happen

20 after a long period of time, he consults with his mother and

21 his mother talks to Mr. Patton, that it's made known to him

22 that no appeal was filed.

23 I would submit that both on a credibility issue,

24 that Mr. Hines deserves credit on the credibility. Again, Mr.

25 Patton doesn't dispute what he says, he just said according to

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1 my pattern, I probably, if he asked me to, I would have filed

2 an appeal. But he didn't say he didn't ask me to. So both on

3 credibility and the law, as far as inadequate consultation with

4 him, following an immediate sentencing, where he's taken off by

5 the Marshals, they have maybe a one or two minute conversation.

6 That's my argument.

7 THE COURT: All right, thank you, Mr. Mead. All

8 right, Mr. Piccinini.

9 MR. PICCININI: Your Honor, first off, I would just

10 note that the government's papers don't address the Harrington

11 v._Gillis matter.

12 THE COURT: But they're going to.

13 MR. PICCININI: They will currently. It may be a
14 timing thing, we filed our brief in July.

15 THE COURT: Let me just say this to you. Partially
16 because I feel so lousy, my memory is not clicking like it
17 should. I'm not going to rule on this thing today. But, go
18 ahead, then I'll tell you about post-hearing submissions and
19 whatnot.

20 MR. PICCININI: Your Honor, just some factual
21 issues. Because as I look at Harrington_v._Gillis, and the

22 underlying Supreme Court case, Roe_v._Flores-Ortega, which

23 clearly sets forth the parameters of your analysis of this
24 issue. There's a couple of threshold things that need to be
25 decided.

1 One, is this a case where there was a need for
2 meaningful consultation. Because in the Supreme Court case

3 they very clearly say and reject Justice Souter's desire to
4 have a bright line test, per se test, that in all cases you
5 must consult with a client concerning whether to have an
6 appeal. The first question is, is this a situation where you
7 must have that consultation.

8 THE COURT: What's the test for that?

9 MR. PICCININI: It's whether or not a rational
10 defendant would want to appeal. And, two, that this particular
11 defendant reasonably demonstrated to counsel that he was
12 interested in appeal.

13 I agree with the representation of what a
14 consultation is. So once you're through that threshold
15 question, because the Supreme Court says, for example, a
16 rational defendant would want to appeal if there are
17 non-frivolous grounds for appeal. And this enhancement here, I
18 guess could be claimed as not being a frivolous ground for an
19 appeal. There is a factual decision you made, although, the
20 likelihood of success is not high. Because this was a
21 sentencing, preponderance of the evidence standard. Then we go
22 to whether, let's say this is one where he had consulted, did
23 he consult. And what I'm left with is defense counsel's

24 belief, as he has done in all cases, that he would stay here,

25 and part of what he would discuss with the defendant are issues

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1 related to appeal.

2 THE COURT: You mean as a matter of his common
3 practice?

4 MR. PICCININI: As a matter of his common practice.

5 He recalls sitting here in the courtroom and having some
6 discussion with the defendant. But I'm left in a case where
7 there's no specific recollection by defense counsel of the
8 conversation.

9 But on the question whether there was consultation,
10 you look to what the defendant says. And the defendant's
11 claims that there was some give and take over his desire, not
12 necessarily to have an appeal, but I think the words he used
13 was try again. And some discussion, the defendant even claims,
14 by counsel, that something along the lines that it would be
15 fruitless. That clearly seems to be meaningful consultation as
16 required by the rules.

17 Because I think it's important to note here that

18 this is not an original sentencing and an original appeal.

19 This is a resentencing. This is a defendant who had been
20 through the process, had previous consultation, had a long
21 two-year longstanding relationship with defense counsel. Had
22 been through an appeal. Had received all the correspondence
23 for appeal. And the length of that discussion was, did not
24 have to be as lengthy here in the courtroom as it did for
25 someone who was going through the process for the first time.

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1 But there are portions of the defendant's claim with
2 regard to how directly he requested the appeal that I think are
3 incredible. Because in the end if you look at was it
4 reasonable for this defendant to have asked for an appeal. One
5 would look at this record and say not really. He had already
6 been through an appeal once, came back for resentencing. The
7 statutory mandatory minimum penalty was 120 months. This is a
8 defendant who only received 15 months more than the statutory
9 mandatory minimum. This isn't some defendant, who as a result
10 of the enhancement, received some significantly higher or
11 double his sentence because of the proceeding. We were talking

12 only 15 months.

13 THE COURT: How much did the enhancement kick up his
14 guideline range, do you know?

15 MR. PICCININI: It kicked it up two levels. As I
16 recall, he was at a criminal history category of three. So he
17 was at a level 31. Where his guideline, with the enhancement,
18 was 135 to 168. Really the only thing that the defendant could
19 be arguing in a post Booker world on sentencing was the

20 reasonableness of the sentence. If you knock off those two
21 points and get from a 31 to a 29, his guideline sentence was
22 108 to 135. The 135 month sentence that you gave fell both
23 within the 29, the level 29 without the weapons enhancement,
24 just as it did at the bottom range of the enhancement or,
25 excuse me, the guideline with the enhancement. Not only are we

1 talking only the difference between a mandatory 10, that he
2 couldn't get out from under no matter what the appeal says,
3 you're looking at a reasonable sentence that fell within the
4 guideline with the enhancement, and within the guideline
5 without the enhancement. So just from a standpoint of is this

6 the type of sentence you would want to appeal, you look at
7 that. Now, he comes in today and testifies that his real
8 reason for wanting to appeal is to be able to get into the drug
9 treatment program, had nothing do with lessening his sentence.

10 THE COURT: It's still not clear to me, either get
11 into it or get some credit?

12 MR. PICCININI: I think it is unclear, the argument
13 at the resentencing was the credit, or even if you got in it,
14 it would knock off your time. And I don't know the answer to
15 the question. There's some indication today that it had some
16 impact as well at the resentencing. If you look at the
17 defendant's petition, your Honor, I think this is telling
18 because this is drafted by the defendant, as his mom testified,
19 it's something that he put together. The defendant
20 specifically talks about this enhancement and having no affect
21 on the drug treatment program whatsoever. But only on the
22 length of the sentence that he would receive. He says right
23 here in Section A on page 6 of 9 of the electronically filed
24 document, "and wherein with the removal of the 2 point gun
25 enhancement my final sentence would have been lesser, and or

1 with new direct appeal I would have had the opportunity to
2 re-argue this point." Everything in this petition, all the way
3 up to July of this year, had to do with the length of his
4 sentence. And my point in telling you this is I think it's
5 somewhat lacking in credibility that there is some larger
6 reason for this appeal, for the reason why he wanted this
7 appeal, for the drug program. I don't think it was ever
8 mentioned with counsel as the basis of the appeal. Here he is
9 in his papers only complaining about the length of the
10 sentence. And we know that the sentence is a sentence that
11 fell within even the lower guideline range and was only 15
12 months higher than the mandatory minimum.

13 THE COURT: But only for the sake of discussion and
14 putting aside this question about its potential impact on his
15 ability to participate in the drug program, what is the
16 downside risk of taking one more swing at the ball. He's not
17 paying for it. Best case scenario -- although, quite frankly,
18 I concur with Mr. Patton's view that it would have been an
19 uphill battle on appeal. What's the downside, if you win, your
20 guideline range is reduced and maybe you get sentenced lower,

21 what's the downside?

22 MR. PICCININI: From a defendant's standpoint, no
23 downside whatsoever. For the government, your Honor, this
24 confirms that the request to take an appeal was never made.
25 This is not a case where Attorney Patton, when requested to

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1 file an appeal, would have had some strenuous objection to the
2 defendant, don't take this appeal, it will adversely affect
3 you. Don't waste your time taking this appeal. This is one
4 where it was counsel who advocated all these things strenuously
5 at sentencing and resentencing. It was counsel who claimed
6 today that he knew these were not non-frivolous issues. It's
7 that same counsel who --

8 THE COURT: So you're saying he wouldn't have been
9 reluctant to do it if he was instructed to do it?

10 MR. PICCININI: No, it plays as much in that regard
11 as it does to defendant's claim that he asked for it. I think
12 the problem here is that the defendant didn't ask for it. And
13 the defendant never communicated his desire. He accepted as
14 part of the entire discussion both at the sentencing and the

15 resentencing. He accepted what was clear to him that the

16 likelihood of prevailing was not, was very unlikely. He did

17 not request an appeal to be had.

18 And then six to eight months after his sentence,

19 long passed his appellate rights had expired, he has to couch

20 this in terms of ineffectiveness of counsel, because he's now

21 in jail and becomes somewhat knowledgeable on the law on this

22 issue. And that's when the thing gets filed. Because, judge,

23 his claims today that the first time around when I appealed, it

24 was just a long time before I got any notice about this appeal.

25 I remember the paperwork took a long time to come. Well, it

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1 didn't, your Honor. Within the time period for the 10-day

2 period to appeal, he's mailed the notice of appeal. It's not

3 just the notice of appeal, it's lengthy two-page correspondence

4 concerning everything that goes on in the process. And

5 counsel's office was in touch with him.

6 Now, we look at the resentencing. He receives

7 within 10 days the judgment, where you reduced the sentence to

8 135 months. He doesn't receive any appellate paperwork, he

9 doesn't receive any correspondence. He receives nothing. If

10 this were a true claim that he knew he could appeal and wanted

11 to do so, he could have communicated it. Why does he wait

12 months and months and months. And Attorney Patton does not

13 recall any conversation with the mother with regard to the

14 issue. But it's interesting he recalls conversations with her

15 about a motorcycle, multiple conversations.

16 THE COURT: What am I to make of the mother's

17 testimony?

18 MR. PICCININI: Well, I have concerns with the

19 mother's testimony. It seems to me she did have multiple

20 conversations with counsel. But I don't believe they were

21 conversations concerning the defendant's desire to file an

22 appeal. If they were, they were solely a claim that now, six

23 months later, the defendant realizes his desire to take an

24 appeal, it's too late, and counsel can't be ineffective for not

25 filing an appeal. Or, unfortunately, the conversation never

1 took place. Because if counsel would recall the motorcycle

2 conversations, why wouldn't he recall a mother contacting him

3 and telling him that their son is dissatisfied because you
4 failed to file the appeal that you were supposed to file on his
5 behalf.

6 And then even after that March, April timeframe, we
7 now wait until July of this year for the filing of the Habeas
8 petition. A Habeas petition that doesn't mention the drug
9 problem whatsoever, just mentions some ineffective claims with
10 regard to the enhancement, and actually with regard to claims
11 on his prior record. So I think, from a credibility
12 standpoint, there are concerns.

13 This is a defendant who, contrary to his claim and
14 testimony today, received notice of the first appeal. This is
15 a situation where, as is the regular practice, the first time
16 this defendant wanted to appeal, Patton's office sends a letter
17 or an e-mail to the Pittsburgh office, what does it say next to
18 Mr. Hines. Appeal, yes. The next time around, within days,
19 this isn't a matter of Attorney Patton just forgetting, within
20 days an e-mail goes out on the resentencing, no appeal, written
21 in bold letters, no appeal. That's the product of some
22 thought, some actual steps taken upon consideration of whether
23 this was a case for an appeal to be filed. And we're now a
24 year removed. Whereas, the time this e-mail goes out, we're

25 days removed. Around the same time that e-mail goes out, where

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1 it says there is no appeal going to be filed, Attorney Patton
2 is sending the judgment and conviction, mailing it to the
3 defendant at the prison. Had there been any discussion or any
4 communication concerning the appeal, the appeal would have been
5 filed.

6 And I think if you look at the Supreme Court case
7 and the Third Circuit case, the first question was there
8 consultation. And here I believe you have a record that is
9 supportive of there having been a consultation. Then the
10 second question is --

11 THE COURT: But that all has to come -- Patton says
12 he has no specific memory of the substance of the conversation,
13 that's understandable given the amount of time. Tell me again
14 by your lights what do I have of record, either direct or
15 circumstantial, which supports a consultative event within the
16 meaning of the case?

17 MR. PICCININI: My difficulty here is -- a lot of
18 this comes from the testimony of the defendant, which I believe

19 half of which is not credible. So it puts me in a bind in
20 making the argument. You do have counsel recalling sitting
21 here at counsel table with the defendant --

22 THE COURT: Talking about something?

23 MR. PICCININI: Talking about something. I can't
24 make the record any better than it is. It highlights the
25 difficulty for the government in these ineffectiveness claims

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1 where a defendant claims something, and this is my second
2 Habeas petition in a row where defense counsel doesn't recall.
3 And it's been a year --

4 THE COURT: What was the other one?

5 MR. PICCININI: In McCoy, we had testimony that a

6 lot of the issues concerning a matter that was raised, there
7 was a lack of recollection as to discussions on that issue. So
8 I'm left defending defense counsel, as is my job in these
9 Habeas petitions, without much testimony from the defense
10 counsel. A defense counsel who clearly has the desire to
11 achieve on behalf of his client, because he still maintains an

12 attorney-client relationship, some leniency in sentencing. I'm
13 not saying Attorney Patton has done anything wrong, but
14 it make it's very difficult for the government to advocate in
15 that light. Because I see in the midst of testimony, not that
16 it's necessarily providing guidance to defense counsel who is
17 claiming his ineffectiveness, on how to properly advocate the
18 ineffectiveness. I'm not saying that Attorney Patton was
19 dishonest in any way in his testimony. He does not recall. It
20 certainly helps the defendant that he does not recall.

21 But you do have circumstantial evidence that shows
22 in the way this process works, if this man would have indicated
23 to counsel and would have made it clear his intention or his
24 desire to appeal, that with this particular defense counsel you
25 know your Honor that he would have appealed. And from a

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1 procedural standpoint, if the conversation took place, there
2 would have been further communication with this defendant
3 concerning his desire to appeal and the right to appeal. And
4 those things are absent from the record, I think it's
5 circumstantial evidence that the conversation never took place.

6 An e-mail goes out within days saying no appeal would be filed.

7 It would not have happened within days of the defendant asking

8 that an appeal be filed. And, at best, we have the defendant's

9 testimony where he says let's try it again. Mr. Patton

10 explains to him, according to the defendant, the fact that, I

11 think we would all agree, it's not a highly likely successful

12 appeal. The defendant doesn't respond to that in any way. He

13 doesn't say today that he responded. He doesn't say well, I

14 said let's appeal anyway. His acquiescence after the

15 consultation with the defense attorney about the lack of any

16 success of an initial appeal, can in no way provide an

17 indication to this court that the defendant clearly expresses

18 his intention to appeal.

19 I think if you look at the factual scenario in the

20 Harrington case, there you have some discussion about an

21 appeal, you have defense counsel actually sending a letter,

22 bringing the appeal paperwork, and then you have months and

23 months of attempts to discuss with defense counsel the desire

24 to appeal. Here we have nothing. We have no record of a phone

25 conversation. We have a defendant who has access to collect

1 calls to his attorney. No phone calls ever. He has the
2 ability for months and months to have correspondence with
3 counsel. None whatsoever. And no record whatsoever of a
4 conversation with the mother. Only a recollection of
5 conversations concerning a motorcycle that needs to be
6 returned.

7 So a lot of this is going to rise and fall on a
8 credibility determination made by the court. I can't add
9 anything to the record about the degree of consultation, it all
10 has to come from the files of counsel, from counsel's
11 discussion. But I think between those two cases, Flores-Ortega

12 and Harrington_v._Gillis, that's where we're going to go with

13 this thing.

14 THE COURT: All right. Anything you want to say
15 before we break?

16 MR. MEAD: No, your Honor, I think the court pretty
17 much knows our position. If the court has any questions of me?

18 THE COURT: I don't. But let me tell you what I'm
19 going to do. From whatever date this transcript of the hearing

20 and the post-hearing argument is filed, each of you will have

21 20 days. I think this is important in this case, because what

22 was said is very important. I can make a credibility

23 determination, but I have to look at the transcript here. You

24 have 20 days from the receipt of the transcript to file what I

25 guess I'm going to characterize as your proposed findings of

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1 fact and conclusions of law, essentially. And then I'll take a

2 look at them, I'll either put something on the record or we'll

3 get out an opinion. All right, thank you.

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5 (Whereupon, at 1:20 p.m., the proceedings were

6 concluded.)

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1 CERTIFICATE

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5 I, Ronald J. Bench, certify that the foregoing is a

6 correct transcript from the record of proceedings in the

7 above-entitled matter.

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13 Ronald J. Bench

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